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ABSTRACT

This report focuses on issues relating to the development and implementation of educational programs for and placement of national origin minority students identified as having limited English proficiency. It examines the present-day barriers that prevent students with limited English proficiency from having an equal opportunity to participate in educational programs. The report evaluates and analyzes the Office for Civil Rights' (OCR) implementation, compliance, and enforcement effort for Title VI of the Civil Rights Act of 1964 and Lau v. Nichols. The Commission found that, in general, OCR operates a highly developed Title VI/Lau civil rights implementation, compliance, and enforcement program. The report contains specific recommendations to further assist OCR in its efforts to ensure that school districts: (1) accurately assess the presence of limited English proficiency in national origin minority students and develop appropriate education programs and placements; (2) do not inappropriately assign students with limited English proficiency to special education programs; (3) do not deny national minority students effective participation in regular education classes because of a failure to address their language barriers; and (4) do not deny students with limited English proficiency access to gifted and talented programs, advanced courses, or other opportunities for education and advancement. (CR)

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Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and *Lau v. Nichols*

Equal Educational Opportunity Project Series
Volume III

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November 1997

A Report of the United States Commission on Civil Rights

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U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and *Lau v. Nichols*

Equal Educational Opportunity Project Series
Volume III

November 1997

A Report of the United States Commission on Civil Rights

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and* Lau v. Nichols, pursuant to Public Law 103-419. This report is the result of the Commission's long-standing commitment to ensure that the Nation's public schools are free of discrimination and that all children in this country are afforded equal educational opportunity. The purpose of this report is to evaluate the efforts of the U.S. Department of Education and its Office for Civil Rights (OCR) to enforce Title VI of the Civil Rights Act of 1964 and the U.S. Supreme Court's 1974 ruling in *Lau v. Nichols*.

The first report of the *Equal Educational Opportunity Project* evaluated and analyzed OCR's history, performance, regulations, policies, and activities, setting the stage for the remaining reports. The second report, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, evaluated and analyzed OCR's Section 504 performance, regulations, policies, and activities specifically related to the development of individualized education programs for and placement of students with mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbance.

With this report, the Commission specifically focused on issues related to the development and implementation of educational programs for and placement of national origin minority students identified as having limited English proficiency. It examines, within the context of educational practices, some of the present-day barriers and inequities that prevent students with limited English proficiency from having an equal opportunity to participate in educational programs, to maximize their learning potential, and to enhance their educational and career opportunities.

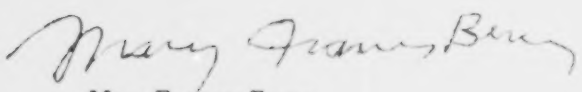
This report evaluates and analyzes OCR's implementation, compliance, and enforcement efforts for Title VI and *Lau v. Nichols*. It discusses other Federal laws affecting students with limited English proficiency, such as the Equal Educational Opportunities Act of 1974 and the Bilingual Education Act, to the extent that they relate to Title VI, *Lau v. Nichols* and public elementary and secondary education for students with limited English proficiency.

The report provides findings and recommendations regarding OCR's Title VI/*Lau* implementation, compliance, and enforcement efforts in order to assist the Department of Education and its Office for Civil Rights, in further improving and strengthening OCR's Title VI/*Lau* program and promoting nondiscrimination and equal educational opportunity for students with limited English proficiency. The Commission finds that, in general, OCR operates a highly developed Title VI/*Lau* civil rights implementation, compliance, and enforcement program.

However, the report contains specific recommendations to further assist OCR in its efforts to ensure school districts: 1) assess accurately the presence of limited English proficiency in national origin minority students and work to develop appropriate educational programs and placements for national origin minority students with limited English proficient skills; 2) do not assign national origin minority students to special education programs on the basis of criteria that essentially measure and evaluate only their English language skills; 3) do not deny national origin minority students effective participation in regular education classes and access to the regular education curriculum because of a failure to address their language barriers; 4) do not deny students with limited English proficiency access to gifted and talented programs, advanced courses, or other opportunities for education and advancement because of their language barriers.

For nondiscrimination and equal educational opportunity to be assured in our nation's public schools, it is essential that the Department of Education work hand in hand with school administrators, teachers, students, parents, and the community at large to provide both educational equity and educational excellence to all students regardless of race, color, national origin, gender, or disability.

Respectfully,
For the Commissioners



Mary Frances Berry
Chairperson

Acknowledgments

This report was prepared under the direction and supervision of Frederick D. Isler, Assistant Staff Director for Civil Rights Evaluation. The report's principal author was David Chambers, Civil Rights Analyst. Michelle Leigh Avery, Civil Rights Analyst; Andrea Baird, Social Scientist; Wanda Johnson, Civil Rights Analyst; Eric Mann, Civil Rights Analyst; and Nadja Zalokar, Supervisory Civil Rights Analyst, made significant contributions to the research for and writing of this report. Ilona Turner, Equal Opportunity Assistant, Jeanette Johnson, and Catherine Kim, Interns, assisted with research for this report. Barbara Fontana and Vanessa Williamson also assisted in obtaining research materials. The legal review was performed by Sicilia Chinn, Attorney Advisor. Editorial review was provided by Ki-Taek Chun, Barbara Fontana, and Lillian Moyano Yob. Gloria Hong provided editorial assistance and supervised the production of the report.

Preface

This report is the third to be published as part of the Commission's Equal Educational Opportunity Project. The project reports focus on the opportunities available to students in American public elementary and secondary education. The purpose of this project is to evaluate the efforts of the U.S. Department of Education (DOEd) and its Office for Civil Rights (OCR) to enforce laws mandating equal educational opportunity, with particular attention to the education offered children with limited English proficiency and to programs provided to children with disabilities.[1] In conducting the project, the Commission intends to evaluate educational practices and policies as they relate to the Department of Education's civil rights enforcement efforts and to focus on areas that improve the quality and distribution of educational opportunities. The Commission has undertaken this project to produce reports benefiting a variety of audiences, including the President, Congress, DOEd, State and local education agencies, the general public, parents, and, most importantly, students in America's public elementary and secondary schools.

The Commission has sought to identify key issues faced by students within public schools and classrooms.[2] In meeting this task, the Commission has focused on several issues for this project, including:

(1) Development of individualized education programs for and placement of students classified as educable mentally retarded, students with learning disabilities, students with behavioral disabilities, and students with serious emotional disturbance; and
(2) Development of education programs for and placement of students with limited English proficiency.

These issues encompass educational practices that exist currently in America's schools. They serve as avenues for exploring some of the present-day barriers and inequities faced by students. It is these barriers and inequities, that prevent all students from having an equal opportunity to participate in education programs, to maximize their learning potential, and to enhance their educational and career opportunities. These issues are of great concern to parents and students, and they form the basis of discrimination complaints filed by individuals throughout the country. Moreover, in the early 1990s and continuing to the present, DOEd and OCR have chosen to focus on many of these issues as priority topics in conducting education research and performing civil rights compliance and enforcement activities.

Based on a review of literature, law, and policies, the Commission has identified five major principles that affect equal access to a quality education:

(1) Structuring education programs to serve a diverse student population by maintaining a primary objective to place students in regular classes and core academic curricula to the greatest extent possible; grouping students to reflect differential ability in various subjects; reevaluating and regrouping students periodically to reflect both the differential ability in

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1 The Equal Educational Opportunity Project addresses the following civil rights and program statutes:
(1) Title IV of the Civil Rights Act of 1964;
(2) Title VI of the Civil Rights Act of 1964;
(3) Title IX of the Education Amendments of 1972;
(4) Section 504 of the Rehabilitation Act of 1973;
(5) Equal Educational Opportunity Act of 1974 (EEOA); and
(6) Education for All Handicapped Children Act of 1975 (renamed the Individuals with Disabilities Education Act (IDEA)).
The Commission recognizes that OCR does not have responsibility for enforcing the EEOA or the IDEA. The project reports discuss these laws only as they relate to OCR's responsibilities.

2 Although private schools have a long tradition in the United States, this report's focus is on public elementary and secondary schools.

various subjects and changes in achievement, performance, and development;
(2) Utilizing neutral and nondiscriminatory diagnostic and screening procedures when placing students in education programs;
(3) Providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents in their children's education;
(4) Evaluating and allocating teachers, facilities, and other resources among education programs;[3] and
(5) Eliminating barriers, providing access to all subjects, activities, and career opportunities and counseling each student to maximize his or her potential opportunities.

Research groups, educators, and other professionals have conducted studies and published articles on many of these issues and principles. However, to date, no one project has addressed all in a comprehensive and integrated fashion. As an independent, bipartisan agency, the Commission has undertaken this project to study these topics and present its findings and recommendations in comprehensive enforcement reports. The reports discuss steps taken by the Federal Government, State and local education agencies, and schools to prevent discrimination and to eliminate barriers to equal educational opportunity. Furthermore, the Commission's reports strive to promote nondiscrimination and equal educational opportunity by discussing criteria for evaluating educational practices from a civil rights perspective. By providing information on civil rights principles to consider when developing and implementing education programs, the Commission hopes to support the efforts of the Federal Government, States, local schools, parents, teachers, and students as they work together to promote equal educational opportunities for all students.

Throughout the Equal Educational Opportunity Project the Commission evaluates OCR's implementation, compliance, and enforcement efforts at the headquarters, regional, State, and local levels. The Commission has undertaken the following activities in conducting the project: 1) at the regional level, the Commission interviewed selected OCR regional offices;[4] 2) the Commission assessed OCR's procedures and organization at the headquarters and regional levels to determine whether they are sufficient and effective for the enforcement of civil rights laws for the project's focus issues; 3) the Commission reviewed OCR's policies and regulations implementing civil rights laws; 4) the Commission determined the extent to which these policies and regulations conform with the civil rights laws; 5) the Commission reviewed OCR's efforts in conducting compliance reviews, complaint investigations, monitoring, and providing technical assistance, outreach, education, and training for the project's main issues; and 6) the Commission selected and analyzed five local school districts throughout the United States to serve as profiles (case studies) for this project.

The first report, *Equal Educational Opportunity Project Series, Volume I*, published in December 1996, set the stage for the remaining reports, and provided findings and recommendations on DOEd's civil rights enforcement activities generally. Because the civil rights laws addressed in this project cover DOEd's Federal financial assistance programs, the first report also provided a summary of DOEd's programs to inform the reader of the specific education programs covered by the civil rights laws. *Volume I* also discussed national trends in education generally and trends relevant to issues discussed in the project. The

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3 In addressing this principle, the project reports focus on the quality and distribution of teaching staff and resources for students. For example, the reports discuss what standards schools, State education agencies (SEAs), and OCR have established for determining that teachers are appropriately trained and certified. They discuss whether and how schools, SEAs, and OCR determine that facilities, books, and other resources are of an appropriate quality level.

4 The Commission conducted onsite and telephone interviews with staff members at OCR's Region IV office in Atlanta, GA. It conducted telephone interviews with staff members of the following other OCR regional offices: Region II—New York, NY; Region III—Philadelphia, PA; Region VI—Dallas, TX; Region VII—Kansas City, MO; Region VIII—Denver, CO; Region IX—San Francisco, CA; and Region X—Seattle, WA.

report also evaluated and analyzed the history, performance, regulations, policies, and activities of OCR. The Commission offered its initial enforcement report with findings and recommendations relating to the overall implementation, compliance, and enforcement efforts of OCR relating to the four focus issues in public elementary and secondary schools.

The present report, *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and* Lau v. Nichols, focuses on the educational opportunities afforded students with limited English proficiency as they relate to the development and implementation of educational programs and appropriate placement for such students. The second report, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, focused on the development of individualized education programs for and placement of students classified as educable mentally retarded, students with learning disabilities, students with behavioral disabilities, and students with serious emotional disturbance.

These reports serve as statutory enforcement reports, offering findings and recommendations on the specific activities of DOEd's OCR relating to each issue. They each discuss the educational and civil rights perspectives on the issues and principles. They summarize the works of educational experts addressing their theories, research, assessments, and opinions. They also describe the education practices and present a wide range of viewpoints held by educators and other professionals. To the extent that DOEd or OCR has encouraged or recommended certain education practices as consistent with civil rights initiatives, the reports discuss DOEd's and OCR's activities to support the practices. The reports then assess the implementation, compliance, and enforcement of civil rights laws by OCR. The reports focus on activities at OCR's headquarters and regional levels to determine the extent and quality of its efforts. The reports also assess the standards created by OCR to ensure and promote nondiscrimination in federally assisted and conducted educational programs. By integrating an understanding of both educational practices and civil rights enforcement within the body of these reports, the Commission emphasizes the importance of providing both educational equity *and* educational excellence to all students regardless of race, color, national origin, gender, or disability.

The Commission intends to use the report that follows to ensure that school districts assess accurately the presence of limited English proficiency in national origin minority students and work to develop appropriate educational programs and placements for national origin minority students with limited English proficient skills; will not assign national origin minority students to special education programs on the basis of criteria that essentially measure and evaluate only their English language skills; that they no longer will be denied effective participation in regular education classes and access to the regular education curriculum because of a failure to address their language barriers; that students with limited English proficiency no longer will be denied access to gifted and talented programs, advanced courses, or other opportunities for education and advancement because of their language barrier.

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Chapter 1

Introduction

Throughout U.S. history, language barriers have impeded members of national origin minority groups whose native language is other than English in their struggle to succeed in the all-English environment of the American classroom.[1] Over the past several decades, however, as the number of such students in the Nation's schools has increased dramatically, the challenges surrounding the provision of equal educational opportunity to students with limited English proficiency have emerged as a major national issue. Since 1970, the largest wave of immigration the United States has experienced since the turn of the century has generated steady growth in the number of students with limited English proficiency in the Nation's schools.[2] The number of language minority children in the United States is at a record high. As of the 1990 census, 6.3 million children, or 14 percent of the Nation's school-age population, were language minority children.[3] Many language minority students speak English proficiently, but in the 1990 census, approximately 38 percent of language minority students reported they had difficulty speaking English. Based on the 1990 census, it has been estimated there are approximately 2.4 million students with limited English proficiency in the United States, or 4 percent of the Nation's school-age population.[4]

Schools across the country have been faced with the challenge of educating students with limited English proficiency. The challenge can be immense. In addition to the need to be taught English so they can benefit from schools' educational programs, many students with limited English proficiency face extra challenges in gaining meaningful access to such programs.[5] Language minority children and youth with limited English proficiency often come from low socioeconomic backgrounds, are less likely to be enrolled

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1 *See* U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, February 1992; U.S. Commission on Civil Rights, *A Better Chance to Learn*, May 1975; U.S. Commission on Civil Rights, *Toward Quality Education for Mexican Americans*, February 1974; U.S. Commission on Civil Rights, *The Southwest Indian Report*, May 1973.

2 *See* Gary Strauss, "Can't Anyone Here Speak English? Exploring the Hidden Costs of the Nation's Language Gap," *USA Today*, Feb. 28, 1997, p. A1. Only about one-half of students with limited English proficiency are immigrants or the children of recent immigrants. *See* U.S. General Accounting Office, *Limited English Proficiency: A Growing and Costly Educational Challenge Facing Many School Districts*, GAO/HEHS–94–38 (January 1994). For instance, many students of American Indian descent have limited English proficiency. *See* U.S. Department of Education, National Center for Education Statistics, *Characteristics of American Indian and Alaska Native Education*, by D. Michael Pavel, Thomas R. Curtin, and Summer D. Whitener, (Washington, DC: U.S. Department of Education, March 1997). Nevertheless, immigration is largely responsible for the growth in the number of students with limited English proficiency over the past several decades.

3 Language minority children are children whose primary home language is not English. *See* chap. 2 for a detailed discussion of the definition of "language minority children."

4 *See* chap. 2 for a more detailed discussion of the numbers and characteristics of students with limited English proficiency.

5 *See generally*, Commission on Behavioral and Social Sciences and Education, National Research Council and Institute of Medicine, Diane August and Kenji Hakuta, eds., *Improving Schooling for Language-Minority Children: A Research Agenda* (Washington, DC: National Academy Press, 1997) (hereafter cited as National Research Council, *Improving Schooling for Language-Minority Children*).

in school and have higher high school dropout rates than their English-proficient peers.[6] Recently, a major report by the National Research Council recounted that "while the numbers of these students are increasing, their educational attainment remains low."[7]

Although language minority children reside in every State of the Union, they are heavily clustered in several States, especially California, New Mexico, Texas, New York, and Arizona.[8] Because immigration has been highly concentrated in a small number of States and localities, some school districts have experienced more acutely than others the pressures associated with educating students with limited English proficiency. In some school districts, such as in Santa Ana, California, more than one-half of all students have limited English proficiency.[9] As of the 1993–1994 school year, almost one-fifth of public school students in the State of California had limited English proficiency, and approximately 10 percent of public school students in three other States (Arizona, New Mexico, and Texas) were limited English proficient.[10] However, virtually every school district in the country has students with limited English proficiency. One-sixth of all school districts have substantial numbers of limited English proficient students.[11]

The challenges surrounding educating students with limited English proficiency have been made more complicated by the remarkable variety of languages spoken by students with limited English proficiency. Although almost three-quarters of students with limited English proficiency are native speakers of Spanish, the remaining one-quarter is comprised of native speakers of a wide variety of languages, with no single language (besides Spanish) spoken by more than 4 percent of students with limited English proficiency.[12] It is not unusual for a single school to be faced with educating students with many native languages as different as Vietnamese, Russian, Navajo, and Hindi.

Schools across the country have sought to meet these challenges through offering special instructional programs to students with limited English proficiency. The primary objective of most of these programs is to teach these students English, while at the same time ensuring they do not fall behind their peers in content areas as they are trying to achieve English proficiency. Such special instructional programs adopt a variety of educational approaches. In "structured immersion" students are taught in English without native language support, while in "English as a Second Language" students are pulled out of the regular classroom for English-language instruction. Schools also use various types of bilingual education, in which the students' native language is used to support their learning of content areas while they are studying English and, in some cases, to ensure students achieve fluency in both English and their native language.[13] A major national controversy has arisen over which of these, or other educational approaches, is the best strategy for educating students with limited English

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6 *See* chap. 2 for a more detailed discussion of the educational attainment and achievement of students with limited English proficiency.

7 National Research Council, *Improving Schooling for Language-Minority Children*, p. 2.

8 *See* chap. 2 for more a detailed discussion of the numbers and characteristics of language minority students.

9 Gary M. Stern, "Immigrant Parents Challenge Bilingual Education," *Hispanic Outlook*, vol. 6, no. 9 (Jan. 5, 1996), p. 8.

10 *See* table 2.4.

11 U.S. General Accounting Office, *Limited English Proficiency: A Growing and Costly Educational Challenge Facing Many School Districts*, GAO/HEHS–94–38, January 1994, p. 5. "Substantial" is defined as a school district having at least 500 limited English proficient students or 5 percent of its student body having limited English proficiency. Ibid.

12 *See* table 2.5.

13 *See* chap. 3 for a discussion of the various educational strategies used by the Nation's schools to educate students with limited English proficiency.

proficiency. For instance, some maintain that the only legitimate goal of such programs is to teach English, whereas others argue that maintaining or building students' native language proficiency is just as important.[14] The Nation appears no closer to a national consensus on these matters than it did several decades ago. Nevertheless, it remains important to ensure, whatever the educational strategy chosen by local school districts, that students with limited English proficiency are afforded equal educational opportunity.

As the number of students with limited English proficiency has grown and schools have grappled with how to educate them, providing equal educational opportunity to students with limited English proficiency has become one of the most important civil rights issues facing the United States in the 1990s. With high rates of immigration unlikely to lessen in the near future, the urgency of assuring this growing minority of American children that they have equal access to the Nation's educational system likely will continue unabated into the next century.

The Federal courts and Congress have sought to address the rights of students with limited English proficiency to equal educational opportunity. As early as 1923, the Supreme Court considered a case addressing equal educational opportunity for students with limited English proficiency. The Court held a Nebraska statute making it criminal to teach any subject in a language other than English, or to teach languages to students who had not passed the eighth grade, violated the due process clause of the 14th amendment.[15] The Court stated, "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."[16]

In 1954, the U.S. Supreme Court handed down its landmark decision, *Brown v. Board of Education*,[17] in which the Court ruled that a State-mandated system of racial segregation in the public schools violated the equal protection clause of the 14th amendment. The court based its holding that "separate but equal is inherently unequal" in large part on the historical and social context of race relations in the United States. The *Brown* Court reasoned that the State-mandated segregation of African American children in the public school system continued to reaffirm the historical and cultural status of African Americans in the United States as inferior to whites and all but guaranteed inequality of educational opportunity in a segregated school system. From a civil rights perspective, this recognition of our Nation's history and culture in the interpretation of the law is one of the most important aspects of the Court's decision in *Brown*. Moreover, the *Brown* decision resonates throughout any evaluation of efforts to ensure nondiscrimination and equal educational opportunity, whether the adversely affected group is adversely affected because of race, color, national origin, disability or gender. *Brown* laid the foundation and attempted to pass the first hurdle in guaranteeing equal educational opportunity for all students through inclusion and integration.

In 1974, the Supreme Court decided another landmark case that, in the spirit of *Brown*, established the right of students with limited English proficiency to equal educational opportunity in American public education. The Court, in its seminal decision in *Lau v. Nichols*,[18] upheld the validity of Federal agency regulations promulgated under Title VI of the Civil Rights Act of 1964[19] specifically addressing educational issues relating to national origin minority students. The

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14 *See* chap. 3 for a more detailed discussion of this controversy.

15 *See* Meyer v. Nebraska, 262 U.S. 390, 397, 403 (1923). In a companion case, *Bartels v. Iowa*, the Court, under the holding in *Meyer*, reversed the convictions of teachers prosecuted for teaching German under State laws in Iowa, Ohio, and Nebraska. 262 U.S. 404 (1923).

16 262 U.S. at 401.

17 347 U.S. 483 (1954).

18 414 U.S. 563 (1974).

court ruled the failure of the San Francisco school system to provide special English language instruction to 1,800 students of Chinese descent who did not speak English denied them meaningful access to effective participation in the public educational program and thus violated Title VI of the Civil Rights Act of 1964.[20] Supreme Court Justice William O. Douglas wrote:

> . . . there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. . . . Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must have already acquired those skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[21]

Implicit in this statement is the belief that American public education has an obligation to ensure language barriers based upon national origin do not prevent students from participating fully in education programs. This premise has provided the foundation for the American public school system's commitment to ensuring that students with limited English proficiency have access to all of the educational opportunities enjoyed by their English proficient peers.

In recent decades, the American public education system has sought to provide equal educational opportunity in part through efforts to ensure all students have the ability to speak, listen, read, write, and comprehend English in the classroom. The Federal effort to promote equal educational opportunity for national origin minority students with limited English proficiency operates through civil rights statutes—Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974—and through two program statutes—Title I and Title VII (also known as the Bilingual Education Act) of the Elementary and Secondary Education Act.[22] Title I and Title VII authorize Federal funds to assist State and local education agencies in providing educational services to national origin minority students with limited English proficiency. The Title I program, previously known as "Chapter I," provides funds to assist school districts in meeting the needs of educationally disadvantaged students, including students with limited English proficiency. The Title I statute does not permit funds to be used for services required of grantees under Title VII, the Bilingual Education Act. In addition, two major court cases—*Lau v. Nichols*, interpreting Title VI's nondiscrimination provisions with respect to students with limited English proficiency, and *Castaneda v. Pickard*, specifying school districts' obligations under the Equal Educational Opportunities Act—have been instrumental in defining the rights of students with limited English proficiency.

In 1964, Congress enacted the landmark Civil Rights Act of 1964. Title VI of that act[23] mandates nondiscrimination on the basis of race, color, or national origin in federally assisted programs. Specifically, Title VI stated:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[24]

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19 Pub. L. No. 88–352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d–7 (1994)).

20 Pub. L. No. 88–352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d–7 (1994)).

21 Lau v. Nichols, 414 U.S. 563, 566 (1974).

22 This statute was reauthorized in 1994 as the Improving America's Schools Act, Pub. L. No. 103–382, 108 Stat. 3518 (codified at 20 U.S.C. §§ 6301–8962 (1994)).

23 42 U.S.C. §§ 2000d to 2000d–7 (1994).

24 *Id.* at § 2000d.

The Federal Government subsequently created three other laws to address the educational problems of students with limited English proficiency. In 1965, Congress passed the Elementary and Secondary Education Act,[25] comprehensive legislation providing Federal funding for education programs. Although Congress initially did not create programs in this statute specifically to address the needs of students with limited English proficiency, many such students have benefited from financial assistance provided through Title I of the act, a program focusing on the economically disadvantaged. Congress most recently reauthorized this statute as the Improving America's Schools Act of 1994. Title I continues to be a specific source of Federal funding that local districts and schools can use for educational activities, including achieving English language literacy. Funds can be used by grantees to establish programs in areas including: computer-assisted instruction, English as a second language, the teaching of reasoning and problem solving, early childhood activities, health and nutrition services, counseling and social services, summer activities, employment and training of special instructional personnel and school counselors, construction of school facilities, and parental participation activities.[26] In addition, the Title I program encourages local school districts to evaluate their education practices and the strategies they are using in providing these students with supplemental skill instruction.[27]

During the late 1960s, advocates on behalf of national origin minority students with limited English proficiency[28] worked to ensure full participation of these students in educational systems.[29] This advocacy led, in 1968, to passage of the Bilingual Education Act as Title VII of the Elementary and Secondary Education Act.[30] The act sought to promote educational opportunities for national origin minority children with limited English proficiency. The act provides for Federal financial assistance to State and local educational agencies "to ensure equal educational opportunity for all children and youth and to promote educational excellence, to assist State and local educational agencies . . . to build their capacity to establish, implement, and sustain programs of instruction for children and youth of limited English proficiency."[31]

Congress designed the Bilingual Education Act to provide temporary funding to local educational agencies for the development of capacity building education programs for students with limited English proficiency. Temporary funding is provided specifically because the purpose of the program is capacity building. Congress appropriated $7.5 million the first year of the act for a grants-in-aid

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25 Pub. L. No. 89–10, 79 Stat. 7 (codified as amended in scattered sections of 20 U.S.C.).

26 *See* 20 U.S.C. §§ 6301–6514 (1994); *see also* Iris Rotberg and James Harvey, *Federal Policy Options for Improving Education of Low Income Students*, vol. 1 (Santa Monica, CA: Rand Corporation, 1993), p. x.

27 Ibid., p. 2.

28 The term "limited English proficiency," as used in Federal laws and policies, generally refers to individuals whose native language is other than English. The Bilingual Education Act defines a "native language" as "the language normally used by such individual, or in the case of a child or youth, the language normally used by the parents of the child or youth." 20 U.S.C. § 7601(11) (1994).

29 Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 Cal. L. Rev. 1249, 1251 (1988) (hereafter cited as Moran, *The Politics of Discretion*).

30 Bilingual Education Act of 1968, Pub. L. No. 90–247, 81 Stat. 783, 816–19 (1968) (codified as amended at 20 U.S.C. §§ 7401–7602 (1994)).

31 20 U.S.C. § 7402(b) (1994). The 1968 act stated as its purpose and policy the following:
"In recognition of the special educational needs of the large numbers of children of limited English-speaking ability in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out new and imaginative elementary and secondary school programs designed to meet these special educational needs." *See* Bilingual Education Act of 1968, § 702, 81 Stat. 783, 816.

program. Although Title VII was a discretionary allocation and not an entitlement, the act represented the first Federal initiative addressing the educational needs of students with limited English proficiency. As such, it marked the beginning of a Federal commitment to assist students with limited English proficiency in obtaining equal educational opportunity.[32] Over the next 10 years, Congress, the U.S. Supreme Court, and U.S. Department of Health, Education, and Welfare's Office for Civil Rights (OCR)[33] fashioned legal standards for establishing civil rights protections and providing equal educational opportunities for students with limited English proficiency.

Initially through U.S. Department of Health, Education, and Welfare policy guidelines interpreting Title VI, and later by the U.S. Supreme Court's decision in the *Lau v. Nichols* case, the nondiscrimination protections of Title VI were interpreted to extend to students with limited English proficiency. On May 25, 1970, 2 years after the passage of the Bilingual Education Act, OCR published policy guidelines, entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin," (hereafter referred to as the "May 1970 guidelines") interpreting Title VI of the Civil Rights Act of 1964.[34] The May 1970 guidelines interpreted Title VI's express prohibition of discrimination based on race, color, or national origin as including a prohibition of discrimination against students with limited English proficiency.[35] The guidelines also detailed the responsibilities of school districts to provide equal educational opportunity to students with limited English proficiency under Title VI. The May 1970 guidelines marked the beginning of Federal policy specifically requiring civil rights protection under Federal law for students with limited English proficiency. These guidelines profoundly influenced the law, and in turn, public school systems in this country.

In 1974, relying on OCR's May 1970 guidelines, the U.S. Supreme Court, in *Lau v. Nichols*, held that a San Francisco school district had violated Title VI.[36] In addressing the needs of "1,800 students of Chinese ancestry," the Court determined that: "[t]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for those students who do not understand English are effectively foreclosed from *any meaningful education*."[37] The Court's decision in *Lau* expanded the Federal Government's role in education policymaking.

By 1975, Federal education law and policy providing civil rights protections to students with limited English proficiency had been greatly expanded through judicial and administrative interpretations of Title VI and by new Federal legislation that defined more clearly the meaning of equal educational opportunity. For example, the *Lau* decision was reaffirmed by both the Congress

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32 In its most recent reauthorization as Title VII of the Improving America's Schools Act of 1994, the Bilingual Education Act states this policy and purpose:
"in order to ensure equal educational opportunity for all children and youth and to promote educational excellence, to assist State and local educational agencies, institutions of higher education and community based organizations to build their capacity to establish, implement, and sustain programs of instruction for children and youth of limited English proficiency. . . " 20 U.S.C. § 7402(b) (1994).
"The purpose of this part is to educate limited English proficient children and youth to meet the same rigorous standards for academic performance expected of all children and youth, including meeting challenging State content standards and challenging State student performance standards. . . " 20 U.S.C. § 7402(c) (1994).

33 On May 4, 1980, the Department of Education Organization Act divided the U.S. Department of Health, Education, and Welfare into the U.S. Department of Education and the U.S. Department of Health and Human Services.

34 *See* discussion below for a further explanation of the content of the May 1970 guidelines.

35 U.S. Department of Education, "Identification on Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11,595 (1970), 34 C.F.R. § 100.3(b)(2) (1996).

36 414 U.S. 563 (1974).

37 *Id.* at 566.

and OCR. Within weeks of the Supreme Court's decision, Congress passed a Federal codification of *Lau*, the Equal Educational Opportunities Act of 1974.[38] The act reaffirmed the rights of students with limited English proficiency to equal educational opportunities. In addition, it imposed on State and local school systems an affirmative duty to take "*appropriate action* to overcome language barriers" obstructing the academic progress of students with limited English proficiency.[39]

The Equal Educational Opportunities Act requires school districts to provide special programs to children with limited English proficiency. Section 1703(f) of the Equal Educational Opportunities Act provides that:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in the instructional programs.[40]

After the *Lau* decision and the enactment of the Equal Educational Opportunities Act, OCR attempted to provide more guidance to school districts on how to fulfill their obligations towards students with limited English proficiency.[41] In 1975, OCR circulated a guidance document entitled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols*," outlining permissible approaches to overcoming the language barrier of students with limited English proficiency.[42] Commonly referred to as the "*Lau* Remedies," or "*Lau* Guidelines," this guidance document was very prescriptive, generally rejected the English as a Second Language approach, and favored bilingual/bicultural approaches to educating students with limited English proficiency.[43] Although the guidelines never were published, many school districts relied on the *Lau* Remedies in formulating educational programs for students with limited English proficiency.

In 1980, after a school district in Alaska filed a lawsuit seeking to prevent enforcement of the *Lau* Remedies because they never had been published as formal regulations,[44] the newly created U.S. Department of Education (DOEd) published a "Notice of Proposed Rulemaking" in the *Federal Register*.[45] The Notice of Proposed Rulemaking stated OCR's intention to create regulations implementing Title VI's protections for students with limited English proficiency and sought public comment.[46] The Notice of Proposed Rulemaking moved away from the *Lau* Remedies' empha-

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38 Pub. L. No. 93–380, 88 Stat. 515 (codified as amended in 20 U.S.C. §§ 1701–1721 (1994)).

39 *Id.* § 1703(f) (emphasis added).

40 20 U.S.C. § 1703(f) (1994).

41 OCR is not responsible for enforcing the Equal Educational Opportunities Act.

42 Office of the Secretary, U.S. Department of Education, "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols*," Summer 1975.

43 *See* Michael A. Rebell and Anne W. Murdaugh, *National Values and Community Values: Part II: Equal Educational Opportunity for Limited English Proficient Students*, 21 J.L. & Educ. 339, 358–59 (Summer 1992) (hereafter cited as Rebell and Murdaugh, *National Values and Community Values*); Jonathan D. Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974*, 18 Columbia J.L. & Soc. Probs. (1983) at 263; Peter Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggested Approach*, 17 J.L. & Soc. Probs. (1981) at 116; Moran, *The Politics of Discretion*, at 1281. *See* discussion below for a further explanation of the content of the *Lau* Remedies.

44 Northwest Arctic Sch. Dist. v. Califano, No. A–77–216 (D. Alaska Sept. 29, 1978).

45 45 Fed. Reg. 52,052 (1980).

46 *Id.*

sis on bilingual/bicultural education, but nonetheless engendered considerable controversy, primarily because of the prescriptive nature of the proposed regulations.[47] Those opposed to the guidelines felt they prescribed every aspect of the development and implementation of educational programs designed to assist students in overcoming their limited English proficiency, thereby intruding on traditional State and local prerogatives to shape educational programs. When Ronald Reagan became President of the United States in 1981, both the Notice of Proposed Rulemaking and the *Lau* Remedies eventually were withdrawn,[48] and DOEd has yet to publish Title VI regulations related specifically to students with limited English proficiency, although OCR has issued further policy guidance.[49]

In 1981, the United States Court of Appeals for the Fifth Circuit decided *Castaneda v. Pickard*,[50] interpreting section 1703(f) of the Equal Educational Opportunities Act. The court's ruling in *Castaneda* gives practical meaning to the controversial term "appropriate action" used by Congress in the Equal Educational Opportunities Act and to the similar term "affirmative steps" used by the U.S. Supreme Court in *Lau* and by OCR in its May 1970 guidelines. In *Castaneda*, the fifth circuit set forth a three-part test for determining whether a school district has taken the appropriate action to overcome language barriers.[51]

Although the *Castaneda* decision does not purport to interpret Title VI, OCR has adopted *Castaneda*'s three-pronged test as its main analytical framework in conducting Title VI/*Lau* implementation, compliance, and enforcement activities, particularly Title VI/*Lau* compliance and complaint investigations. The *Castaneda* standard also has been influential in guiding discrimination analyses involving students with limited English proficiency conducted by other Federal courts in other circuits.[52]

In December 1985, DOEd's Office for Civil Rights (OCR) issued a policy memorandum (hereafter referred to as "December 1985 memorandum") that reversed OCR's previous prescriptive approach.[53] In September 1991, OCR issued a "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)."[54] This policy update expanded upon the December 1985 mem-

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47 *See* Moran, *The Politics of Discretion*, at 1293–1296; Betsy Levin, *An Analysis of the Federal Attempt to Regulation Bilingual Education: Protecting Civil Rights or Controlling Curriculum?*, 12 J.L. & Educ. (January 1983) at 39.

48 *See* 46 Fed. Reg. 10,516 (1981).

49 *See* Moran, *The Politics of Discretion*, at 1294.

50 648 F.2d 989 (5th Cir. 1981).

51 648 F.2d 989, 1009–10 (5th Cir. 1981). *Castaneda*'s three-pronged test to determine whether schools are in compliance with the requirements of the Equal Educational Opportunities Act involves evaluating:
(1) whether the schools have chosen an educational program that is recognized as sound by at least some experts in the field of education;
(2) whether the schools are taking steps to implement their chosen educational program effectively; and
(3) whether the schools' chosen educational program can be shown to be successful in overcoming the language barriers confronting students with limited English proficiency.

52 *See* Gomez v. Illinois Bd. of Educ., 811 F.2d 1030, 1041–43 (7th Cir. 1987); Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 713–16 (N.D. Cal. 1989).

53 U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," Dec. 3, 1985. *See* discussion below for a further explanation of the content of the December 1985 guidelines.

54 Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991. This policy guidance opens with the following statements: "This policy update is primarily designed for use in conducting *Lau* compliance reviews—that is, compliance reviews designed to determine whether schools are complying with their obligation under the regulation implementing Title VI of the Civil Rights Act of 1964 to provide

orandum and explicitly adopts the fifth circuit's three-pronged test in *Castaneda*.[55]

For the past 16 years, DOEd has relied on the standard set forth in *Castaneda*. It has offered this standard as a guideline for the legal responsibilities of States and local educational agencies in teaching students with limited English proficiency. However, State educational agencies and local school systems retain great discretion to implement a variety of educational programs designed to assist students with limited English proficiency.

Today, in carrying out its responsibilities in implementing and enforcing Title VI of the Civil Rights Act of 1964[56] as interpreted by the *Lau* decision, DOEd regulations, and OCR policies, OCR seeks to ensure equal educational opportunity in the development and implementation of education programs for students with limited English proficiency. OCR's efforts to ensure equal educational opportunity can have a significant impact on the educational experiences of such students. In keeping with the importance of its efforts in this area, OCR, in its 1994 strategic plan, identified "access to programs for limited English proficient students" as a priority compliance issue.[57]

In undertaking its efforts to ensure equal educational opportunity, OCR evaluates the effectiveness with which school systems are educating students with limited English proficiency. Educational effectiveness reflects the main focus of OCR's implementation and enforcement activities. Both educational and civil rights perspectives inform OCR's analysis in determining educational effectiveness and, in turn, ensuring civil rights compliance. OCR therefore relies on a broad range of educational and legal theories in conducting its civil rights enforcement activities. In making a determination as to the effectiveness of an education program, OCR must assess a variety of important aspects of program implementation. These include: the program's efforts to promote equal access, to prevent segregation or racial isolation, to provide a high level of quality including excellence and equity in all aspects of program implementation, and to ensure that the students served are succeeding academically. OCR's inquiry in conducting its civil rights enforcement activities focuses on the quality of important aspects of an education program's implementation, such as appropriate procedures for parental notification and the encouragement of parental involvement; the use of nondiscriminatory screening and placement decisions; an emphasis on efforts to reduce the presence of segregation or racial isolation; the use of modifications in grouping practices and instructional content to meet specific needs, and frequent assessments of student progress; the identification, certification, hiring, and retention of qualified teachers; and, finally, the provision of counseling services, the identification of health and social service needs, and the availability of broad and challenging curricula.[58]

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any alternative language program necessary to ensure that national origin minority students with limited-English-proficiency (LEP students) have meaningful access to the schools' program. The policy update adheres to OCR's past determination that Title VI does not mandate any particular program of instruction for LEP students." Ibid.

55 Ibid., p. 1.

56 42 U.S.C. § 2000d (1994).

57 U.S. Department of Education, Office for Civil Rights, Strategic Plan, July 1994, p. 2.

58 *See generally* Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991; U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," Dec. 3, 1985; U.S. Department of Health, Education, and Welfare, "Identification on Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11,595 (1970). *See also* William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. Rev. 1693, 1699, 1704 (1993); James McPartland, *Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?*, 42 Law & Contemp. Probs. 108, 110–113, 124, 131

The U.S. Commission on Civil Rights long has sought to ensure the promise of *Brown* and *Lau* is kept for students with limited English proficiency. It has addressed the problems associated with achieving the goals of equal educational opportunity for students with limited English proficiency in the American public education system. Since the Commission's inception in 1957, it has released numerous reports addressing educational topics relating to limited English proficiency, often in the context of investigating civil rights issues facing members of national origin minorities. The Commission's publication record on these issues includes numerous statutory reports, clearinghouse publications, staff reports, and State advisory committee reports.[59] Among the numerous titles of Commission reports addressing education issues for national origin minorities are: *Equal Educational Opportunities for the Spanish Speaking Child: Bilingual and Bicultural Educational Programs*;[60] *The Southwest Indian Report*;[61] *The Navajo Nation: An American Colony*;[62] *Toward Quality Education for Mexican Americans*;[63] *A Better Chance to Learn: Bilingual-Bicultural Education*;[64] *Shortchanging the Language-Minority Student: An Evaluation of the Manchester, New Hampshire School Department's Title VI Civil Rights Compliance Plan*;[65] and *Civil Rights Issues Facing Asian Americans in the 1990s*.[66] In this last report, the Commission found:

> Providing equal educational opportunity to Asian American LEP students requires sound student assessment procedures and programs that can orient them and their parents to American society and American schools. Asian American LEP students need bilingual education and English as a Second Language (ESL) programs staffed by trained teachers to enable them to learn English and at the same time keep up in school. They need professional bilingual/bicultural counseling services to help them in their social adjustment and academic development. Our investigation has revealed that these needs of Asian American LEP students are being drastically underserved. In particular, there is a dire shortage of trained bilingual/ESL teachers and counselors.[67]

In the present report, recognizing the enduring challenge of providing equal educational opportunity for students with limited English proficiency, the Commission builds upon the legacy of its past

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(Summer 1978); Robert Crain and Jack Strauss, *School Desegregation and Black Educational Attainment* 12–29 (Baltimore, MD: Center for Social Organization of Schools, The Johns Hopkins Univ. Rep. No. 359, July 1985).

59 *See* U.S. Commission on Civil Rights, *Catalog of Publications* (Washington, DC: U.S. Commission on Civil Rights, June 1996); U.S. Commission on Civil Rights, *Out of Print Publications* (Washington, DC: U.S. Commission on Civil Rights, 1996).

60 U.S. Commission on Civil Rights, *Equal Educational Opportunities for the Spanish Speaking Child: Bilingual and Bicultural Educational Programs* (Washington, D.C.: U.S. Commission on Civil Rights, 1970).

61 U.S. Commission on Civil Rights, *The Southwest Indian Report* (Washington, DC: U.S. Commission on Civil Rights, May 1973).

62 U.S. Commission on Civil Rights, *The Navajo Nation: An American Colony* (Washington, DC: U.S. Commission on Civil Rights, September 1975).

63 U.S. Commission on Civil Rights, *Toward Quality Education for Mexican Americans* (Washington, DC: U.S. Commission on Civil Rights, February 1974).

64 U.S. Commission on Civil Rights, *A Better Chance to Learn: Bilingual-Bicultural Education* (Washington, DC: U.S. Commission on Civil Rights, May 1975).

65 New Hampshire Advisory Committee to the U.S. Commission on Civil Rights, *Shortchanging the Language-Minority Student: An Evaluation of the Manchester, New Hampshire School Department's Title VI Civil Rights Compliance Plan* (Washington, DC: U.S. Commission on Civil Rights, December 1982).

66 U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (Washington, DC: U.S. Commission on Civil Rights, February 1992) (hereafter cited as *Civil Rights Issues Facing Asian Americans*).

67 *Civil Rights Issues Facing Asian Americans*, pp. 193–94.

reports on students with limited English proficiency in light of present-day barriers and inequities facing students with limited English proficiency in the Nation's schools. These present-day barriers and inequities include the segregative effects that can arise when these students are removed from the regular education classroom for extended periods of time during the course of the school day and/or for lengthy periods of time during their academic careers. Conversely, these students may be exited from language assistance programs before they are ready to make the adjustment to an all-English environment. In addition, students with limited English proficiency may find themselves at a distinct disadvantage in competing on standardized tests such as the verbal portion of the SAT or in completing classroom assignments that require a higher ability to read and write in English than they possess.

The complexities confronting school districts in addressing these problems demonstrate the need for continued vigorous enforcement of Title VI and *Lau v. Nichols* by OCR. OCR's efforts remain crucial to ensuring equal educational opportunity to students with limited English proficiency. The Commission evaluates the effectiveness and vigor with which OCR promotes equal educational opportunity in its Title VI/*Lau* implementation, compliance, and enforcement activities. This report addresses OCR's efforts by focusing on two areas: 1) the importance of the nexus between OCR's legal responsibilities and educational theory, research literature, law, and policy reflected in the education program requirements identified in the Equal Educational Opportunity Project's five principles;[68] and 2) the quality and effectiveness of OCR's Title VI/*Lau* implementation, compliance, and enforcement activities in evaluating education programs for students with limited English proficiency.

Overall, this report analyzes OCR's efforts to implement, ensure compliance with, and enforce Title VI and the U.S. Supreme Court's ruling in *Lau v. Nichols*. Because the Equal Educational Opportunities Act of 1974 and its interpretation by the Federal courts offer a further prohibition against discrimination on the basis of national origin, it is addressed as it relates to Title VI/*Lau* enforcement. The discussion provides a basis for showing how OCR has incorporated educational standards and principles into its Title VI/*Lau* program. The report also analyzes how OCR has worked to promote equal educational opportunity for students with limited English proficiency.

This report focuses solely on Title VI/*Lau* enforcement issues as they affect language minority students with limited English proficiency. Some may argue the language barriers facing students who are not language minorities, i.e. children of English-speaking parents, when they enter school not understanding or speaking standard English, is an equally compelling civil rights issue. When the Oakland, California Unified School District adopted a policy recognizing that some of its students spoke "Ebonics," or black English, and needed special help to acquire proficiency in standard English in 1996, the issue came to the forefront of national debate.[69] However, the Commission has chosen, in this report, to limit its focus to language minority children to ensure the pressing civil rights issues facing these children are afforded adequate attention.

It also needs to be stressed that it is not the Commission's intent, in this report, to evaluate the merits of the different educational programs designed to provide students with limited English proficiency with equal access to educational opportunities, meaningful access, and effective participation in the education programs provided in the Nation's public schools. The issue of whether students with limited English proficiency ought to be provided with bilingual education as opposed to educational strategies that rely primarily on English has become highly politicized.[70] With this

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68 *See* preface for a discussion of the five principles.

69 *See* chap. 3 for a more detailed background discussion of the "Ebonics" debate.

70 For instance, the State of California has a pending ballot initiative that, if passed, would virtually prohibit school districts from providing bilingual education instruction to students with limited English proficiency. *See* Lou Cannon, "Bilingual

report, the Commission does not intend to become embroiled in this controversy, but instead to focus squarely on civil rights issues, not educational policy decisions. Thus, although this report describes briefly a variety of educational approaches commonly used in educating students with limited English proficiency, including bilingual education, English as a Second Language, and English immersion programs, to provide background, the Commission does not take a position on which of these educational approaches may or may not be preferable. Rather, the focus of the report is on whether OCR's civil rights enforcement program adequately and effectively protects the civil rights of and promotes equal educational opportunity for all national origin minority students with limited English proficiency, regardless of the type of educational program in which they are enrolled.

Education Under Attack: California Ballot Initiative Backers Hope Effort Will Resonate Elsewhere," *Washington Post*, July 21, 1997, p. A15; "Bilingual Education Targeted in California," *Education Daily*, vol. 30, no. 133 (July 11, 1997), pp. 3–4.

Chapter 2

National Statistical Trends for Students with Limited English Proficiency

This chapter considers the demographic characteristics, educational placements, and educational attainment of the Nation's diverse population of students who are limited English proficient and the larger population of "language minority students" of which students with limited English proficiency are a subset.[1]

The Language Minority School-age Population

The language minority population between the ages of 5 and 17 is a potential at-risk student population with complex linguistic and educational needs.[2] Thus, this population is a group of students who may be in need of intervention strategies to enable them to have an equal opportunity to succeed in school programs offered only in English.[3] Language minority students are those whose family or home language is other than English. A part of this population is English proficient, while another part is not.[4]

Language Minority Students

The Size of the Population

The number of language minority students in the United States can be estimated using the decennial censuses of the population. In 1980 and 1990, the Census Bureau's long form, administered to one in six households, asked in reference

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1 The term "limited English proficient" includes children who are "non-English-speaking," as well as those who are "limited English speaking." It also can include those who are limited in English reading, writing, and/or English comprehension skills if tests measure those skills. *See* Center on Evaluation, Development, Research, *Bilingual Education: Time to Take a Second Look?* (Bloomington, IN: Phi Delta Kappa, 1990), p. 27 (hereafter cited as *Time to Take A Second Look?*); Dorothy Waggoner, *Language Minority Children at Risk in America: Concepts, Definitions, and Estimates* (Washington, DC: National Council of La Raza, October 1984), p. 7 (hereafter cited as Waggoner, *Language Minority Children at Risk*); and U.S. Department of Education, Office for Civil Rights, *Promising Practices and Programs for Serving National Origin Limited English Proficient Students*, prepared by the *Lau* Team, March 1996, p. i (hereafter cited as OCR, *Promising Practices*).
The Bilingual Education Act considers an individual as having limited English proficiency if the individual meets the following criteria:
(i) was not born in the United States or whose native language is a language other than English and comes from an environment where a language other than English is dominant; or (ii) is a Native American or Alaska Native or who is a native resident of the outlying areas and comes from an environment where a language other than English has had a significant impact on such individual's level of English language proficiency; or (iii) is migratory and whose native language is other than English and comes from an environment where a language other than English is dominant; and
(B) who has sufficient difficulty speaking, reading, writing, or understanding the English language and whose difficulties may deny such individual the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in our society.
20 U.S.C. § 7601(8)(A)-(B) (1994).

2 Waggoner, *Language Minority Children at Risk*, p. 15; and Maria Torres-Guzman, "Language Minorities: Moving from the Periphery to the Center?," *The Educational Forum*, Summer 1994 (vol. 58), p. 410.

3 Waggoner, *Language Minority Children at Risk*, p. 15.

4 U.S. Department of Education, Office of the Secretary, *Condition of Bilingual Education in the Nation: A Report to the Congress and the President* (June 30, 1992), p. 24 (hereafter cited as DOEd, *Condition of Bilingual Education*).

to household members aged 5 and older in the surveyed households, whether they spoke a language other than English at home. If the answer to this question was that the person speaks a language other than English, then the person can be classified as "language minority." However, it should be noted that some persons may speak English predominantly and another language only occasionally and be classified as language minority by their answer to this question. Thus, the 1980 and 1990 censuses likely overidentify the number of language minority students where language minority students are defined as students whose primary home language is not English.[5] The question asked in the 1970 census was slightly different, in that it asked whether individuals' "native tongue" was English or another language. As a result, estimates of the language minority population based on the 1970 census also likely overidentify the number of language minority students, since some persons whose native tongue is other than English currently may speak only English at home.

Based on the 1970 census question, 5.0 million children between the ages of 5 and 18 were language minorities in 1970.[6] One decade later, the 1980 census counted about 4.6 million youngsters who were members of a language minority,[7] or 9.6 percent of the school-age population.[8] By 1990,[9] the number of language minority students had reached 6.3 million, or 14 percent of the school-age population.[10]

Geographic Distribution

In 1990, California, New Mexico, Texas, New York, and Arizona had more than 20 percent of their student population classified as language minorities.[11] California had the highest percentage (35 percent) and size (1.9 million) of its total K–12 population classified as language minority.[12] The language minority student population in California accounted for 30 percent of the Nation's entire population of such students.[13] Following California as States with large percentages of the student population from linguistic minority backgrounds are New Mexico (30 percent of 5- to 17-year olds), Texas (28 percent), and New York and Arizona (each with 23 percent of

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5 However, although language minority children may be overcounted, it generally is thought that the number of children who have limited English proficiency is undercounted.

6 Waggoner, *Language Minority Children at Risk*, p. 4.

7 The estimated number of "language minority students" probably decreased not because the actual number of language minority students decreased, but because the 1980 census question was more restrictive in terms of which students were classified as language minority.

8 U.S. Department of Education, National Center for Education Statistics, *Condition of Education 1994*, by Thomas Smith (Washington, DC: Government Printing Office, August 1994), p. 307 (hereafter cited as DOEd, *Condition of Education 1994*).

9 The most recent data available on the language minority student population are from the 1990 U.S. Census.

10 DOEd, *Condition of Education 1994*, p. 308.

11 Ibid.

12 Ibid.

13 *See* table 2.1. Based on a case study of California's language minority population funded by California's State education agency, various linguistically and culturally distinct groups comprise California's language minority population; and almost 100 languages are represented in the State's public schools. *See* DOEd, *Condition of Bilingual Education*, p. 25. Because California's language minority population is more mobile/transient than its non-language-minority population, the student composition shifts between and within years. Ibid. Children depart or enter school at various times, and the demographic characteristics over the duration of programs (such as English acquisition classes geared to students with a particular linguistic and cultural background) can change in unpredictable ways. Ibid. For instance, in the early 1990s, various schools that were examined as a case study experienced successive changes in their non-English language groups within a short time period. One school in California that developed a bilingual education program for its predominantly Spanish speaking linguistic minority population later had to cope with ensuing waves of Afghan and Russian immigrants. Ibid.

their respective student population from language minority backgrounds). Altogether, about 2 million of the Nation's language minority children (or 30 percent) resided in these four States (see table 2.1).

National Origins

Overall in the Nation, Hispanics and Asian Americans comprise the bulk of the language minority student population. The Hispanic language minority student population is diverse.[14] About 66 percent are of Mexican background, and 11 and 4 percent are of Puerto Rican and Cuban ancestry respectively.[15] Most Hispanics also were from bilingual homes, and described themselves as more proficient in English than in their home language.[16] In addition, English proficiency was directly related to socioeconomic status.[17]

The Nation's Asian American population is very diverse. Among the Asian Americans, about 20 percent are of Filipino backgrounds, 17 percent of Chinese origin, and another 13 percent of Southeast Asian origin. Other significant groups include Korean, Pacific Islander, and Japanese origins.[18] About 75 percent of Asian American students come from bilingual families, and most rate themselves (based on census data) as having high proficiency in English and a low proficiency in their native languages. Those with higher socioeconomic status (SES) are more likely to possess high English proficiency than those from lower SES backgrounds.[19] Furthermore, many Asian Americans from Southeast Asian countries arrive in the United States as refugees and are likely to have interrupted schooling and be illiterate and poor.

Home Languages of Language Minority Children

Based on 1990 census data, about 66 percent (4.2 million) of the 6.3 million language minority children speak Spanish at home. Seven other languages have at least 100,000 speakers aged 5 to 17. French is spoken by almost 270,000 youngsters; Chinese languages by 219,000, and German by 183,000.[20] All other languages spoken by more than 100,000 children and youth are Asian: Vietnamese, Asian Indian, Korean, and Filipino (e.g., Tagalog and Ilocano).[21]

Students with Limited English Proficiency

A subset of language minority students have limited English proficiency, or difficulty speaking English.

Number and Geographic Distribution

The number of language minority students who are "limited English proficient" can be estimated based on the census question on English proficiency asked of all persons who speak a language other than English at home. The 1980 and 1990 census of population asked the following question of those who spoke a language other than English at home: "How well does this person speak English?"[22] Possible responses were "very

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14 DOEd, *Condition of Bilingual Education*, pp. 24–25.

15 Ibid.

16 Ibid., p. 25.

17 Ibid.

18 Ibid., p. 24.

19 Ibid., p. 24.

20 Dorothy Waggoner, ed., *Numbers and Needs: Ethnic and Linguistic Minorities in the United States*, vol. 5, no. 4 (Washington, DC: July 1995), p. 2 (hereafter cited as Waggoner, *Numbers and Needs*). *See* table 2.2.

21 Ibid., p. 2. *See* table 2.2.

22 DOEd, *Condition of Education 1994*, p. 130.

TABLE 2.1
Children and Youth 5 to 17 Years Old Who Speak a Language Other than English at Home and Who Speak English with Difficulty, by State: 1980 and 1990
(In numbers of children and youth)

	1980			1990		
	All children 5 to 17	Total speakers of other languages	Total who speak English with difficulty	All children 5 to 17	Total speakers of other languages	Total who speak English with with difficulty
US	47,493,975	4,568,329	1,883,395	45,342,448	6,322,934	2,388,243
AL	867,635	14,379	3,900	779,216	23,122	8,117
AK	91,871	9,800	4,616	117,070	11,158	4,111
AZ	578,750	129,814	60,213	688,361	156,782	61,069
AR	495,992	8,023	2,396	457,208	13,587	4,304
CA	4,685,403	1,073,945	493,641	5,363,005	1,878,957	796,905
CO	593,914	47,351	16,445	608,578	51,202	17,908
CT	638,990	70,212	24,047	522,667	78,041	26,738
DE	125,470	5,557	1,769	114,559	7,403	2,765
DC	109,311	5,817	1,956	80,008	9,444	3,989
FL	1,794,858	205,592	66,466	2,021,858	360,452	113,441
GA	1,235,867	27,690	8,569	1,236,622	55,976	19,834
HI	198,167	29,475	14,432	198,205	29,600	11,253
ID	213,569	9,928	3,692	227,791	13,241	4,633
IL	2,407,255	234,057	90,040	2,103,057	302,087	102,031
IN	1,200,631	43,154	15,105	1,059,526	51,651	19,078
IA	605,996	15,834	5,439	526,115	20,740	7,375
KS	468,820	17,146	6,253	474,043	25,036	8,818
KY	801,733	12,860	4,131	705,277	20,063	7,475
LA	971,609	49,221	16,967	895,657	49,382	16,826
ME	243,690	12,884	3,581	223,494	9,886	2,655
MD	895,619	45,256	13,832	806,039	67,904	21,879
MA	1,155,475	106,410	37,626	940,711	143,528	50,444
MI	2,068,134	80,218	24,066	1,761,163	95,963	27,815
MN	867,061	24,767	8,129	831,671	42,163	17,013
MS	602,032	10,277	3,603	552,960	16,594	6,186
MO	1,010,684	24,710	7,873	947,101	33,731	12,230
MT	167,426	5,372	2,115	163,940	6,382	2,102
NE	324,887	8,891	2,731	309,706	11,256	3,323
NV	159,786	11,984	4,344	203,376	24,055	8,953
NH	196,172	9,183	2,145	194,492	8,561	2,587
NJ	1,530,830	205,109	71,703	1,269,172	245,795	76,273
NM	303,120	110,624	48,471	321,418	94,719	33,779
NY	3,559,784	612,561	233,945	3,008,894	700,788	247,948
NC	1,256,408	26,038	8,054	1,152,157	54,382	21,784
ND	136,996	3,872	1,111	127,720	3,456	894
OH	2,307,791	86,066	27,504	2,019,893	100,589	36,570
OK	623,293	20,914	8,101	613,015	28,351	9,473
OR	525,901	23,328	9,053	522,568	36,776	13,169
PA	2,379,510	111,958	40,130	2,000,469	136,203	49,787

(continued)

TABLE 2.1 (continued)
Children and Youth 5 to 17 Years Old Who Speak a Language Other than English at Home, and Who Speak English with Difficulty, by State: 1980 and 1990
(In numbers of children and youth)

	1980			1990		
	All children 5 to 17	Total speakers of other languages	Total who speak English with difficulty	All children 5 to 17	Total speakers of other languages	Total who speak English with with difficulty
RI	186,659	18,585	6,860	158,964	25,970	8,928
SC	705,533	15,813	4,840	666,884	23,346	8,068
SD	148,151	7,082	2,912	144,167	5,849	1,930
TN	974,666	17,152	5,563	883,214	28,694	9,702
TX	3,143,074	803,353	413,393	3,454,664	974,282	391,881
UT	349,752	18,914	7,552	458,429	25,434	8,428
VT	110,001	3,715	850	102,343	3,212	774
VA	1,113,789	42,727	13,014	1,063,388	74,634	23,668
WA	833,853	46,706	18,220	893,647	78,267	30,077
WV	414,460	6,487	1,431	337,661	9,129	2,815
WI	1,012,663	33,320	9,675	930,099	51,171	19,320
WY	100,934	4,198	891	100,206	3,940	1,118

Source: U.S. Department of Education, National Center for Education Statistics, *Condition of Education 1994*, by Thomas Smith et al. (Washington, DC: Government Printing Office, August 1994), pp. 307 and 308.

well," "well," "not well," and "not at all."[23] Persons who replied less than "very well" can be classified as "speaking English with difficulty" or "limited English proficient."[24]

Based on the 1990 census, about 38 percent of the language minority student population had difficulty speaking English (see table 2.1). This proportion varied by State. States with a relatively large number of language minority students had greater proportions of language minority students (and all students) who had difficulty speaking English. For instance, in California and Texas, more than 40 percent of their respective language minority school-age populations (or 15 and 11 percent, respectively, of their total school-age populations) had difficulty speaking English (see table 2.1). In Florida and New York, more than 30 percent of their respective language minority student populations (or 6 and 8 percent, respectively, of their total school-age populations)

23 Ibid.

24 Ibid. Thus, estimates of the number of children who have limited English proficiency that are derived from census data are based on assessments of the children's English proficiency made by the member of the household filling out the census questionnaire. Some research has found that many language minority respondents reporting that they speak English well test at much lower levels of English proficiency. The census question addresses speaking ability, not more general English proficiency, which includes the ability to understand, read, and write, as well as speak, English. Therefore, there is considerable controversy about the accuracy of estimates of the limited English proficient population that are derived from census data.

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TABLE 2.2
Estimated Number of 5- to 17-Year-Old Home Speakers of Non-English Languages, by Language: 1990

Language	Number of speakers
Total (all languages)	6,323,000
Amerind/Alaska Native	74,000
Arabic	66,000
Asian Ind. languages	119,000
Chinese languages	219,000
Farsi	36,000
French	269,000
German	183,000
Greek	51,000
Haitian Creole	44,000
Hmong	41,000
Italian	94,000
Japanese	49,000
Korean	116,000
Mon-Khmer	49,000
Polish	55,000
Portuguese	76,000
Russian	37,000
Spanish	4,168,000
Tagalog and Ilocano	102,000
Thai and Laotian	57,000
Vietnamese	135,000

Note: The languages shown have at least 35,000 speakers between the ages of 5 and 17.
Source: Dorothy Waggoner, ed., *Numbers and Needs: Ethnic and Linguistic Minorities in the United States*, vol. 4 195, no. 4 (Washington, DC: July 1995), p. 2.

had difficulty speaking English. In contrast, in States such as Vermont and South Dakota, about 25 percent of their language minority students (or about 1 percent of their school-age population) reported that they had difficulty speaking English (see table 2.1).

Based on the 1990 census, about 60 percent of the Nation's children who have difficulty speaking English reside in three large States: California (33 percent), Texas (16 percent), and New York (10 percent). Florida and Illinois are tied as the States with the fourth largest percentage of students (about 5 percent each) who reported difficulty speaking English. The remaining 46 States (including the District of Columbia) have 2 percent or fewer of the Nation's 5- to 17-year-olds who were reported to have difficulty speaking English (see table 2.1).

Several States that do not have a high concentration of language minority students nevertheless have experienced growth in their populations of school-aged children with limited English proficiency. For instance, in the State of Minnesota, the number of children reported to have difficulty speaking English more than doubled, from 8,129 to 17,013, between 1980 and 1990. Similarly, the population of 5- to 17-year-olds reported to have difficulty speaking English in Alabama increased from 3,900 in 1980 to 8,117 in 1990. Georgia also experienced sizable growth (from 8,569 in 1980 to 19,834 in 1990) in the number of children with difficulty speaking English (see table 2.1).

Growth of the Language Minority Student Population Who are Limited English Proficient

The 1990 census data revealed that more than 5.3 percent of the Nation's 5- to 17-year-olds (or 2.4 million students) had difficulty speaking English, up from 4 percent (or 1.9 million students) in 1980. This represents a 27 percent increase.[25] Growth in the population of students who speak English with difficulty varied by State. For instance, States such as Georgia, Minnesota, and North Carolina had increases of over 100 percent, adding almost 34,000 students who speak English with difficulty. California's 61 percent increase and Florida's 71 percent increase added 303,264 students (the largest State "contribution") and 46,975 students, respectively to the Nation's 5- to 17-year-olds who had difficulty speaking English (see table 2.1).

Only 10 States experienced a decline between 1980 and 1990 in the number of children who

25 DOEd, *Condition of Education 1994*, pp. 307–08. See table 2.1.

spoke English with difficulty (see table 2.1). Although Texas experienced a 5.2 percent decline in the number of children who had difficulty speaking English (a decline of more than 21,000 students), the State still had the second highest number of such children (more than 11 percent of its school-age population) among the States.

Students with Limited English Proficiency in the Nation's Schools

National Growth

Based on data collected from State education agencies by the Office of Bilingual Education and Minority Languages Affairs (OBEMLA),[26] in 1994–1995, the Nation's elementary and secondary schools enrolled approximately 3.2 million students from language minority backgrounds who had limited English proficiency, up from 3.0 million students in the previous year.[27] Overall, from 1990–1991, when the Nation enrolled 2.2 million students with limited English proficiency, to 1994–1995, the limited English proficient population in the Nation's schools grew by 45 percent.[28]

Distribution

Although students with limited English proficiency are spread across the country, they tend to be concentrated in a relatively limited number of school districts. A 1992 survey administered to a sample of school districts by OBEMLA[29] (here-

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26 OBEMLA maintains data on its grantees, such as State education agencies that participate in the Title VII program. Each year, OBEMLA obtains data on the number of students with limited English proficiency in each State from a survey it administers to State education agencies. The explicit purpose of the survey is to collect information on the number of students with limited English proficiency in each State, and results are used to inform Congress and the U.S. Department of Education (DOEd) about the size of the limited English proficient population and services available to them. OBEMLA considers this survey information as a census count of students with limited English proficiency in "participating" States, since submission of the State education agency survey is required of all grantees participating in OBEMLA's State Education Agency Program (unless they are not equipped to do so). However, the reported count is not a national total of students with limited English proficiency for several reasons. Because the Bilingual Education Act does not require States to collect data on the number of students with limited English proficiency in their State if they do not have the means to do so, in any given year, various States do not participate in the State Education Agency Program. Therefore, OBEMLA data does not include the counts of the number of students with limited English proficiency in those States. In addition, some State grantees may undercount their students with limited English proficiency. Third, students with limited English proficiency attending private institutions are consistently undercounted. In 1993–1994, Pennsylvania, Virginia, West Virginia, and two territories did not participate in the State Education Agency Program. *See* Development Associates, Inc., *Summary of Bilingual Education: State Educational Agency Program Survey of States' Limited English Proficient Persons and Available Educational Services: 1993–1994*, September 1995, p. iii (hereafter cited as *Summary of Bilingual Education SEA Program Survey*).

27 U.S. Department of Education, Office of Bilingual Education and Minority Languages Affairs, National Clearinghouse for Bilingual Education, *Summary Report of the Survey of the States' Limited English Proficient Students and Available Education Programs and Services, 1994–1995* (Washington, DC: National Clearinghouse for Bilingual Education, 1996), p. 11.

28 Ibid.

29 In the summer of 1992, Development Associates, under contract to OBEMLA, mailed a survey to 745 school districts, 1,835 schools, and 949 teachers, to examine the size and location of the limited English proficient population in the United States and the relationship between sources of funding and the nature of services provided. U.S. Department of Education, Office of the Under Secretary, *Descriptive Study of Services to Limited English Proficient Students, Volume 1, Summary of Findings and Conclusions*, by Howard L. Fleischman and Paul J. Hopstock, Development Associates, Inc., 1993, p. 1 (hereafter cited as DOEd, *Descriptive Study*). The one-time study had several major objectives, including the identification and characteristics of students with limited English proficiency in regions, schools, and specific grade levels; a description of the types, content, duration, and intensity of instructional services (especially Title VII) provided to students with limited English proficiency in the United States; and numbers, types, and qualifications (including first and second language proficiency), and education background of staff (including training/certification in bilingual or English as a Second Language instruction). Separate surveys were mailed to coordinators for students with limited English proficiency at 745 local school districts; 1,835 schools; and 949 teachers of students with limited English proficiency. Followup telephone calls were made to 99 school districts and 263 schools. Site visits were also conducted to 10 school districts. Ibid., p. 2.

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after referred to as the "1992 Descriptive Study") revealed that in the 1991–1992 school year, approximately 6,400 of the country's 15,000 school districts enrolled students with limited English proficiency.[30] The number of students with limited English proficiency in districts ranged from 1 to 242,000 (in Los Angeles School District). Among districts that enrolled students with limited English proficiency, 24 percent had 9 or fewer of such students, while 8 percent had at least 1,000 students with limited English proficiency.[31] Almost 50 percent of the school districts with students with limited English proficiency served student populations that were less than 2 percent limited English proficient, while 6 percent of districts served student populations that were more than 40 percent limited English proficient.[32]

Many of the Nation's schools serve only a small number of students with limited English proficiency. In the 1991–1992 school year, 20 percent of the schools with any students with limited English proficiency had fewer than 4 students, while 6 percent served at least 300 students with limited English proficiency.[33] The average number of students with limited English proficiency per school was 73 for elementary schools, 66 for middle schools, and 87 for high schools.[34]

Most of the Nation's students with limited English proficiency are concentrated in the lower grades. About 24 percent of students with limited English proficiency were in kindergarten and first grade, while only 8 percent were in the 11th and 12th grades.[35] A concentration in the lower grades also was found when the number of students with limited English proficiency in each specific grade was compared to the respective total public school enrollment in that grade.[36] For example, 8 percent of the Nation's kindergarten and first graders in public schools were students with limited English proficiency, while only 3 percent of high school seniors enrolled in public schools had limited English proficient status.[37] Higher than average dropout rates and increased English language proficiency can contribute to the drop in students with limited English proficiency between lower and higher grades. Furthermore, some older children with limited English proficiency may never have attended schools in the United States and hence are not technically dropouts.

Statewide Comparisons

The enrollment in the Nation's schools of students with limited English proficiency varies by State. The 1992 Descriptive Study of school districts indicated that in the fall of 1991, 59 percent of students with limited English proficiency re-

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The sample included the 100 largest school districts in terms of the number of students with limited English proficiency. The remaining 645 school districts were selected with probability proportionate to the size of the limited English proficient population. The 1,835 schools were stratified into elementary, middle, and high schools; and were selected with probability proportionate to size of the limited English proficient population. The 949 teachers were selected from 150 of the 1,835 schools. Paul J. Hopstock, Development Associates, Inc., telephone interview, Sept. 4, 1996.
Survey questions were asked with respect to the 1991–1992 school year, and all survey responses/results were weighted to be nationally representative. *See* DOEd, *Descriptive Study*. All tables in this report indicate that results from surveys were weighted to be nationally representative.

30 DOEd, *Descriptive Study*, p. 3; and U.S. Department of Education, Office of the Under Secretary, *Biennial Evaluation Report: Fiscal Years 1993–1994*, p. 201–2 (hereafter cited as DOEd, *Biennial Evaluation Report*).

31 DOEd, *Descriptive Study*, p. 3.

32 Ibid.

33 Ibid.

34 Ibid., p. 9.

35 Ibid., p. 5.

36 Ibid.

37 Ibid.

sided in the west census region.[38] Twenty percent of students with limited English proficiency resided in the south census region, while 13 percent and 8 percent lived in the northeast and north central regions, respectively.[39]

In 1994–1995, in data collected by OBEMLA from State education agencies, California reported the largest number of students with limited English proficiency (1.3 million students). California accounted for about 42 percent of the U.S. total limited English proficient student enrollment.[40] Texas had the second largest number of students with limited English proficiency, with 457,437 students, followed by New York with more than 236,356 students (see table 2.3). Florida and Illinois also had sizable limited English proficient enrollments, with 153,841 and 107,084 students respectively (see table 2.3). In 1994–1995, these five States accounted for 74 percent of the Nation's students with limited English proficiency, approximately the same share that they accounted for in each year between 1990–1991[41] to 1993–1994, inclusive (see table 2.3). The five States with the largest limited English proficient student populations have been in this position consistently, at least throughout the 1990s. One possible explanation is that these States are the Nation's population centers and major port-of-entry States—those in which immigrants first enter the United States.[42]

Between 1990–1991 and 1994–1995, the average State (including the District of Columbia) increase in the number of identified students with limited English proficiency was 39 percent. The change ranged from a 26 percent decrease in Louisiana to a 240 percent increase in Oregon (see table 2.3). During this period, nine States had increases in the number of students with limited English proficiency of more than 100 percent: Alabama, Alaska, Arkansas, Idaho, Kansas, Nebraska, Nevada, North Carolina, and Oregon (see table 2.3). During the 5-year period, more than 33 percent of the States had increases of more than 50 percent.

Although the number of California's students with limited English proficiency grew by only 28 percent between 1990–1991 and 1994–1995 (which was below the Nation's 39 percent average), the State added the highest number of such students to the Nation's limited English proficient population (see table 2.3). Other States that added a significant number of students with limited English proficiency were Texas (with more than 100,000 students), Florida (about 70,000 students), and New York (68,148 students) (see table 2.3).

Between 1990–1991 and 1994–1995, only five States reported decreases in their limited English proficient enrollment, with the most sizable decrease (26 percent, or 1,779 students) occurring in Louisiana (see table 2.3). Other States with decreases in their limited English proficient populations between 1990–1991 and 1994–1995 included Delaware and New Hampshire—States that have relatively low (fewer than 2,000 students) limited English proficient enrollments (see table 2.3).

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38 Ibid., p. 3.

39 Ibid.

40 *See* table 2.3. The year 1994–1995 is the most recent year of State limited English proficient totals.

41 The year 1990–1991 is the first year of State-level data on students with limited English proficiency.

42 DOEd, *Condition of Bilingual Education*, p. 31.

TABLE 2.3
Number of Identified Students with Limited English Proficiency: 1990–1991, 1991–1992, 1992–1993, 1993–1994, and 1994–1995
(In numbers of children and youth)

	1990–1991	1991–1992	1992–1993	1993–1994	1994–1995
AL	1,052	1,671	2,332	3,214	3,502
AK	11,184	12,056	13,489	26,812	29,929
AZ	65,727	75,941	83,843	95,011	98,128
AR	2,000	N/A	3,423	4,002	4,405
CA	986,462	1,078,705	1,151,819	1,215,218	1,262,982
CO	17,187	25,025	24,876	26,203	26,765
CT	16,988	16,703	17,637	21,020	20,392
DE	1,969	2,086	1,847	1,584	1,799
DC	3,359	3,555	5,132	4,498	5,221
FL	83,937	97,288	130,131	144,731	153,841
GA	6,921	7,955	10,043	11,877	12,865
HI	9,730	10,433	11,251	11,761	12,216
ID	3,986	4,980	4,616	6,883	8,959
IL	79,291	87,178	94,471	99,637	107,084
IN	4,670	4,822	5,017	5,342	6,293
IA	3,705	4,417	4,556	5,343	5,807
KS	4,661	6,180	6,900	6,900	10,148
KY	N/A	1,544	1,738	2,207	2,161
LA	8,345	9,040	5,890	6,277	6,566
ME	1,983	1,770	1,820	1,886	2,430
MD	12,701	12,580	12,719	14,336	14,687
MA	42,606	42,912	45,405	44,094	44,476
MI	37,112	36,720	37,272	45,163	47,123
MN	13,204	15,769	17,979	20,108	21,738
MS	2,753	3,058	3,222	3,259	2,748
MO	3,815	4,350	4,365	4,765	5,442
MT	6,635	6,824	7,817	8,265	8,599
NE	1,257	1,856	2,623	3,714	4,017
NV	9,057	10,735	12,040	14,370	23,390
NH	1,146	1,135	1,004	1,126	1,084
NJ	50,770	47,515	49,627	53,161	52,081
NM	73,505	64,307	83,771	79,829	84,457
NY	168,208	184,857	194,593	216,448	236,356
NC	6,030	7,026	8,900	12,428	14,901
ND	7,187	9,579	8,652	9,400	8,531
OH	8,992	11,172	11,125	12,627	12,243
OK	15,860	17,705	19,714	26,653	31,562
OR	7,557	12,605	16,359	19,651	25,701
PA	N/A	N/A	N/A	N/A	19,889
RI	7,632	8,142	8,350	8,529	9,093
SC	N/A	1,466	1,594	2,036	1,891
SD	6,691	8,961	8,197	5,438	8,571
TN	3,660	2,636	2,770	3,533	4,119

(continued)

TABLE 2.3 (continued)
Number of Identified Students with Limited English Proficiency: 1990–1991, 1991–1992, 1992–1993, 1993–1994, and 1994–1995
(In numbers of children and youth)

	1990–1991	1991–1992	1992–1993	1993–1994	1994–1995
TX	313,234	331,869	344,915	422,677	457,437
UT	14,860	23,589	24,447	21,364	21,360
VT	500	580	723	859	869
VA	N/A	N/A	N/A	N/A	N/A
WA	28,646	34,314	32,858	30,627	51,598
WV	231	N/A	N/A	N/A	N/A
WI	14,648	15,159	14,788	17,677	20,787
WY	1,919	1,996	2,027	2,013	1,853
U.S. total	2,173,573	2,370,775	2,558,487	2,804,556	3,018,042

Source: For years 1990-1991 to 1993-1994: Development Associates, Inc., *Summary of Bilingual Education: State Educational Agency Program Survey of States' Limited English Proficient Persons and Available Educational Services: 1993-1994*, September 1995, p. 11. For 1994-1995: U.S. Department of Education, Office of Bilingual Education and Minority Languages Affairs, National Clearinghouse for Bilingual Education, *Summary Report of the Survey of the States' Limited English Proficient Students and Available Educational Programs and Services 1994-1995*, chap. 2, table 2.2.

Students with Limited English Proficiency as a Percentage of Total Public School Enrollment

Based on the "Schools and Staffing Survey"[43] administered to a representative sample of schools across the country, in the 1993–1994[44] school year, the National Center for Education Statistics estimated that there were 2.1 million students with limited English proficiency in the United States, or approximately 5.1 percent of the total public school enrollment.[45] The western and southwestern States generally have higher proportions of students with limited English proficiency than do States in other regions of the country. Students with limited English proficiency had their highest shares of total public school enrollment in California, Arizona, and Texas (19.2, 10.4, and 9.7 percent respectively). Similarly, New Mexico and Alaska reported student enrollments that were 9.4 and 7.8 percent limited English proficient, respectively (see table 2.4).[46]

43 Approximately every 3 years since 1987–1988, the National Center for Education Statistics has administered the Schools and Staffing Survey, which is disseminated to a sample of schools to collect information on staffing patterns, staff-pupil ratios, student characteristics and programs offered. The survey last was administered in 1993–994. That year, 9,956 public schools and 3,315 private schools were surveyed. A total of 68,284 teachers (56,736 public school teachers and 11,548 private school teachers) also received the survey. Ninety-two percent of the public schools and 83 percent of the private schools completed the survey questionnaire; 85 percent of public school teachers and 75 percent of private schools teachers returned their questionnaires. The next Schools and Staffing Survey is scheduled to be conducted in 1998–1999.

44 The year 1993–1994 is the only year of data on the proportion of students with limited English proficiency (relative to total school enrollment) in each State.

45 U.S. Department of Education, National Center for Education Statistics, *A Profile of Policies and Practices for Limited English Proficient Students: Screening Methods, Program Support, and Teacher Training (SASS 1993–1994)*, by Mei Han et al. (Washington, DC: Government Printing Office, January 1997), table 1, p. 6 (hereafter cited as DOEd, *A Profile of Policies and Practices for LEP Students*).

46 DOEd, *A Profile of Policies and Practices for LEP Students*, table 1, p. 6.

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TABLE 2.4
Percentage of Public School Students Who Are Limited English Proficient, by State: 1993-1994

State	Percentage LEP	State	Percentage LEP
Total	5.1	MO	0.5
AL	0.1	MT	2.9
AK	7.8	NE	--
AZ	10.4	NV	5.8
AR	0.3	NH	0.3
CA	19.2	NJ	4.6
CO	2.8	NM	9.4
CT	3.0	NY	7.7
DE	1.1	NC	1.3
DC	--	ND	1.9
FL	5.9	OH	0.7
GA	0.9	OK	2.8
HI	6.7	OR	2.6
ID	2.2	PA	0.9
IL	3.1	RI	5.6
IN	0.4	SC	0.3
IA	0.9	SD	--
KS	1.1	TN	0.3
KY	--	TX	9.7
LA	0.7	UT	1.3
ME	0.4	VT	--
MD	1.2	VA	1.2
MA	4.3	WA	4.1
MI	1.3	WV	--
MN	2.5	WI	1.1
MS	0.6	WY	0.6

Source: U.S. Department of Education, National Center for Education Statistics, *A Profile of Policies and Practices for Limited English Proficient Students: Screening Methods, Program Support, and Teacher Training (SASS 1993-1994)*, by Mei Han et al. (Washington, DC: Government Printing Office, January 1997), table 1, p. 6. States with "--" had too few students with limited English proficiency in the sample to determine the limited English proficient percentage of total school enrollment.

In the Schools and Staffing Survey, several Eastern States also reported high proportions of students with limited English proficiency for the 1993–1994 school year, such as New York (7.7 percent), Florida (5.9 percent), and New Jersey (4.6 percent) (see table 2.4).[47] Relatively high proportions of students with limited English proficiency could be at least partially attributable to an influx of immigrants (mostly from Spanish-speaking countries) and of refugees from Southeast Asia, and a high birthrate among language minority families.[48] More than one-half of the States reported limited English proficient enrollments less than 4 percent; and about one-third had limited English proficient enrollments below 1 percent (see table 2.4).[49]

Demographic Characteristics

Not all students with limited English proficiency are immigrants or recent arrivals.[50] The 1992 Descriptive Study revealed that in 1991–1992 41 percent of students with limited English proficiency in elementary school were born in the United States, as were 21 and 13 percent, respectively, of middle school and high school students with limited English proficiency.[51] In contrast, fewer than 18 percent of elementary school students with limited English proficiency, 24 percent of middle school students with limited English proficiency, and 27 percent of high school students with limited English proficiency were born outside of and had lived in the United States for less than 1 year.[52]

The limited English proficient population represents significant linguistic, cultural, and ethnic diversity. In the California public schools alone, almost 100 languages are represented.[53] In the Nation overall, although students with limited

TABLE 2.5
Distribution of Languages Spoken by Students with Limited English Proficiency: 1991-1992

Language groups	Percentage of students with limited English proficiency
Spanish	72.9
Vietnamese	3.9
Hmong	1.8
Cantonese	1.7
Cambodian	1.6
Korean	1.6
Laotian	1.3
Navajo	1.3
Tagalog	1.1
Russian	0.9
Creole (French)	0.9
Arabic	0.9
Portuguese	0.7
Japanese	0.6
Armenian	0.5
Chinese (unspec.)	0.5
Mandarin	0.5
Farsi	0.4
Hindi	0.3
Polish	0.3

Source: U.S. Department of Education, Office of the Under Secretary, *Descriptive Study of Services to Limited English Proficient Students, Volume 1, Summary of Findings and Conclusions*, by Howard L. Fleischman and Paul J. Hopstock, Development Associates, Inc., 1993, p. 11.

47 DOEd, *A Profile of Policies and Practices for LEP Students*, table 1, p. 6.

48 DOEd, *Condition of Bilingual Education*, p. 32.

49 DOEd, *A Profile of Policies and Practices for LEP Students*.

50 DOEd, *Descriptive Study*, p. 6.

51 Ibid., p. 12.

52 Ibid., p. 12.

53 DOEd, *Condition of Bilingual Education*, p. 25.

English proficiency speak a variety of languages, the Spanish language dominates and is spoken by 73 percent of students with limited English proficiency.[54] The next largest groups were Vietnamese, Hmong, Cantonese, Cambodian, and Korean (see table 2.5). Students with limited English proficiency whose primary language was a Native American language (about 29 distinct languages) represented 2.5 percent of all students with limited English proficiency in the United States.[55]

Students with limited English proficiency often come from families with lower socioeconomic status than the population at large. Based on the 1992 Descriptive Study, the socioeconomic status of students with limited English proficiency is lower than that of the general school population, as measured by their eligibility for free or reduced price school lunches.[56] Overall, 77 percent of students with limited English proficiency were eligible for free or reduced price school lunches, in contrast to only 38 percent of all students in the same schools.[57] Students with limited English proficiency are disproportionately represented in schools with high concentrations of poor children.[58] The proportion of first grade students with limited English proficiency in high-poverty schools (22 percent) is three times the proportion found in low-poverty schools (7 percent).[59]

A congressionally mandated study issued by DOEd in 1995 also finds that students with limited English proficiency tend to be poor. That study found that 54 percent of students with limited English proficiency in first and third grades were from families with incomes below $15,000. Furthermore, their parents generally also had limited English proficiency, with less than one-third of the parents reporting very good skills in speaking, reading, and writing English. One-half of the mothers of students with limited English proficiency in the study had not graduated from high school.[60]

English Language Instructional Programs in the Nation's Schools

As schools undertake to serve increasingly diverse student bodies, school districts across the United States must provide services for children from language minority backgrounds who also are limited English proficient, to address their specific language education and instructional needs and priorities.[61]

Language Acquisition Classes

Based on the 1993–1994 Schools and Staffing Survey,[62] in the 1993–1994 school year, 42.7 percent of public schools offered ESL programs, and 17.8 percent offered bilingual education programs for limited English proficient students.[63] The percentage of schools having ESL programs had increased considerably since the 1987–1988 school year, when only 34.4 percent of schools offered ESL programs; but the percentage offering bilingual education programs remained relatively con-

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54 DOEd, *Descriptive Study*, p. 5.

55 DOEd, *Descriptive Study*, p. 5.

56 DOEd, *Descriptive Study*, p. 5.

57 Ibid., p. 5.

58 DOEd, *1993–1994 Biennial Evaluation Report*, p. 201–01. The concepts, "poor" and "high-poverty schools" were not defined.

59 Ibid., p. 201–2.

60 U.S. Department of Education, *Prospects: The Congressionally Mandated Study of Educational Growth and Opportunity: Language Minority and Limited English Proficient Students*, 1995, "Analysis and Highlights," p. 2.

61 DOEd, *Condition of Education 1994*, p. 130.

62 *See* above for a discussion of the Schools and Staffing Survey.

63 U.S. Department of Education, National Center for Education Statistics, *Schools and Staffing in the United States: A Statistical Profile, 1993–94*, by Robin R. Henke et al. (Washington, DC: Government Printing Office, July 1996), table 2.4, p. 26 (hereafter cited as DOEd, *1993–94 Schools and Staffing*).

stant over the 5-year period.[64] In 1993–1994, 52 percent of the Nation's public school students attended schools that offered ESL programs, and 23 percent attended schools that offered bilingual education.[65]

Language Education

The Schools and Staffing Survey revealed that in 1993–1994, altogether, almost 3 million students attending public schools participated in ESL and/or bilingual education programs. More students received instruction in ESL (1.65 million) than bilingual education (1.28 million).[66] In addition, more students were served at the elementary than the secondary school level. Almost 5 percent (1.3 million) of elementary school students received ESL services, and 4 percent (1.1 million) of elementary school students received bilingual education services.[67] In contrast, at the secondary level, approximately 3 percent (350,000) of students received ESL services, and 1 percent (200,000) of students participated in bilingual education.[68]

Based on the results of the 1992 Descriptive Study, in 1991–1992 approximately 93 percent of students with limited English proficiency received some type of special instructional service.[69] Special instructional services received ranged from full-day specialized instruction to a single period pull-out class.[70] Seventy-seven percent of students with limited English proficiency received specialized instruction in English, while almost 39 percent received language arts in their native language.[71] At the elementary school level, almost 50 percent of students received at least some instruction in their native language, compared to under 30 percent for secondary school students.[72] The types of language education and instructional services provided to limited English proficient children depend primarily on local conditions and available school district resources, and not exclusively on the pupil's academic and language acquisition needs and priorities.[73]

Beneficiaries of Federally Funded Programs to Educate Students with Limited English Proficiency

Most funding for instruction for students with limited English proficiency comes from States' and school districts' general funds.[74] However,

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64 U.S. Department of Education, National Center for Education Statistics, *Schools and Staffing in the United States: A Statistical Profile, 1990–91*, by Susan P. Choy et al. (Washington, DC: Government Printing Office, July 1993), table 2.10, p. 25 (hereafter cited as DOEd, *1990–91 Schools and Staffing*). In the 1987–1988 school year, 20.0 percent of public elementary and secondary schools offered bilingual education programs. Ibid. It should be noted that few programs are "pure," and most programs mix elements of bilingual education and ESL models.

65 U.S. Department of Education, National Center for Education Statistics, *Condition of Education 1995*, by Thomas Smith et al. (Washington, DC: Government Printing Office, June 1995), p. 342.

66 Students may participate in more than one program or service. *See* U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1995*, by Thomas D. Snyder (Washington, DC: Government Printing Office, October 1995) p. 70.

67 Ibid., p. 70.

68 Ibid.

69 DOEd, *Descriptive Study*, p. 22. The instruction provided may or may not have been restricted to students with limited English proficiency, depending on school policy. *See* ibid., p. 24. Data on the Nation's recipients of English language acquisition classes (such as ESL and bilingual education) do not specifically state the number of students with limited English proficiency being served.

70 Ibid., p. 29.

71 Ibid., p. 29.

72 Ibid., p. 22.

73 National Association for Bilingual Education, *Questions and Answers on Bilingual Education*, (Washington, DC: January 1993), p. 5 (hereafter cited as NABE, *Questions and Answers*).

the Federal Government, through the Bilingual Education Act, provides financial support in the form of discretionary grants to local school districts, so that they may implement and expand programs that address the educational needs of language minority students.[75] OBEMLA is authorized to administer Title VII programs under the Bilingual Education Act.[76] Depending on the particular grant program, school districts can use funds for bilingual education, ESL, or other suitable English language instruction programs. Between fiscal year 1988[77] and fiscal year 1992,[78] various Title VII, Part A grants were administered on a competitive basis to school districts and other educational agencies for classroom instruction projects that would enable students with limited English proficiency to achieve English competence and to meet grade promotion and graduation requirements.[79] Three particular kinds of English language instruction programs were funded:

Transitional bilingual education: A program that uses the native language of students with limited English proficiency along with English to provide an instructional program to achieve English proficiency.[80] Generally, a child with limited English proficiency initially is taught reading in English and the native language, while other subjects are taught in the native language until the student has sufficient competency in English to receive subject instruction in English.[81]

Special alternative instruction: Programs that do not require use of the limited English proficient child's native language, such as English as a Second Language (ESL) and immersion.[82]

Developmental bilingual education: Full-time programs that provide a balance of English and native language instruction (i.e., equal emphasis on English and native languages).[83]

Transitional bilingual education projects and others that used the native languages of students with limited English proficiency are mandated to receive at least 75 percent of the Title VII, Part A appropriations.[84]

Between 1988 and 1992, most of the student beneficiaries of Title VII Part A funds were in transitional bilingual education projects, but the number of children served by transitional bilingual education projects fluctuated, while there was significant growth in the other two grant programs during this period (see table 2.6). In 1992, more than 224,000 of the total 315,000 stu-

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74 DOEd, *The Condition of Bilingual Education*, p. 47; and Kris Anstrom, *Defining the Limited English Proficient Population* (Washington, DC: National Clearinghouse on Bilingual Education, June 1996), p. 2 (hereafter cited as Anstrom, *Defining the LEP Population*).

75 U.S. Department of Education, Office of Bilingual Education and Minority Languages Affairs, "Educating Linguistically and Culturally Diverse Students," no date, brochure.

76 DOEd, *Condition of Bilingual Education*, p. 62.

77 The year 1987–1988 is the first year of data on students with limited English proficiency as OBEMLA beneficiaries.

78 The year 1991–1992 is the most recent year of available data on students with limited English proficiency as beneficiaries of federally grants.

79 DOEd, *Condition of Bilingual Education*, pp. 62–63.

80 DOEd, *Condition of Bilingual Education*, p. 63.

81 Steven Aleman, *Bilingual Education Act: Background and Reauthorization Issues* (Washington, DC: Congressional Research Service, January 1993), p. 6 (hereafter cited as Aleman, *Bilingual Education Act*).

82 Aleman, *Bilingual Education Act*, p. 8.

83 DOEd, *Condition of Bilingual Education*, p. 64.

84 Aleman, *Bilingual Education Act*, p. 6.

TABLE 2.6
Number of Beneficiaries for Federal Title VIIA Programs, by Year

	FY 1988	FY 1989	FY 1990	FY 1991	FY 1992
Transitional bilingual education	202,546	194,469	226,000	209,918	224,400
Developmental bilingual education	450	254	2,731	3,320	4,600
Special alternative instruction	14,230	36,579	45,570	62,178	86,000

Source: Steven Aleman, *Bilingual Education Act: Background and Reauthorization Issues* (Washington, DC: Congressional Research Service, January 1993), pp. 7-9.

dents with limited English proficiency who were beneficiaries of the three Title VII Part A programs participated in transitional bilingual education (see table 2.6). The number of children and youth participating in federally funded developmental bilingual education increased more (approximately 1,000 percent) than did the other two English skills programs (see table 2.6). The number of beneficiaries for special alternative projects increased consistently between 1988 and 1992 (see table 2.6). By 1992, there were more than six times as many beneficiaries (86,000 students) in the Nation as there were in 1988 (14,230 students).[85]

Overall, in the late 1980s and early 1990s, 9.6 percent of limited English proficient students participated in federally funded services, while 72.7 percent participated in programs that were funded by States and localities.[86] In the 1990–1991 school year,[87] fewer than 260,000 of identified students with limited English proficiency were served in instructional programs sponsored by OBEMLA grants to local districts, whereas 1.6 million identified students with limited English proficiency were served in programs that were funded by State or local appropriations.[88] By 1993–1994,[89] slightly more than 352,000 students with limited English proficiency (about 12 percent of the Nation's 2.8 million limited English proficient school enrollment (see table 2.3) were provided with services through the Federal Government's Title VII funded programs.[90] State and local bilingual education programs enrolled 1.4 million students, while State and local ESL

85 Aleman, *Bilingual Education Act*, p. 9.

86 DOEd, *Descriptive Study*, p. 30.

87 The year 1990–1991 is the first year of available data that compares *numbers* of limited English proficient beneficiaries of Federal to State/local programs.

88 DOEd, *Condition of Bilingual Education*, p. 20.

89 The year 1993–1994 is the most recent year of available data that compares numbers of limited English proficient beneficiaries of Federal to State/local programs.

90 Anstrom, *Defining the LEP Population*, p. 2.

programs enrolled 757,000 students with limited English proficiency.[91]

Educators Who Teach Students with Limited English Proficiency

In the 1990–1991 Schools and Staffing Survey, 18,609 elementary and 12,767 secondary school teachers, respectively, reported that they instructed courses in bilingual education or ESL as their primary assignments (the field in which they teach the most classes).[92] By 1993–1994, there were 27,414 elementary and 12,425 secondary teachers for ESL/bilingual education classes.[93] In 1993–1994, approximately 25 percent of schools had vacancies in ESL and/or bilingual education.[94] Of the Nation's schools that had vacancies in multiple fields (e.g., general elementary, special education, foreign language, mathematics), vacancies in ESL/bilingual education were reported as the most difficult (if not impossible) to fill.[95]

Large numbers of public school teachers in the United States who are not specialists instruct at least one student with limited English proficiency in grades K–12; they teach classes containing mostly English proficient students along with some students with limited English proficiency.[96] Based on the results of the 1992 Descriptive Study, in 1991–1992[97] 15 percent of all public school teachers had at least one student with limited English proficiency in their classroom.[98] Of teachers who served at least one student with limited English proficiency, 66 percent had some, but not a majority, students with limited English proficiency in their classes, while 18 percent of the teachers instructed classes composed mostly of students with limited English proficiency.[99] The remaining 16 percent taught specialized classes such as ESL or bilingual education.[100]

In 1994, approximately 40 percent of the Nation's teachers had students with limited English proficiency in their classes. However, only 29 percent of teachers with limited English proficient students in their classes had received training on how to meet the needs of this subpopulation. This disparity was especially evident at the secondary school level. Approximately 50 percent of the teachers who instructed students with limited English proficiency had received relevant training.[101]

More than 90 percent of the teachers who taught students with limited English proficiency were white (Hispanic and non-Hispanic), while 4 percent were black.[102] Teachers of students with

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91 *Summary of Bilingual Education SEA Program Survey*, p. vi. According to the National Association of Bilingual Education, State and local monies account for the preponderance of services to students with limited English proficiency, because the country does not possess sufficient personnel resources to undertake the education of students with limited English proficiency. *See* NABE, *Questions and Answers*, p. 6.

92 DOEd, *1990–91 Schools and Staffing*, table 4.1, p. 52. The document combines the number of ESL and bilingual education teachers.

93 DOEd, *1993–94 Schools and Staffing*, table 4.1, p. 71.

94 DOEd, *1993–94 Schools and Staffing*, table 7.3a, p. 140.

95 DOEd, *1993–94 Schools and Staffing*, table 1.5.

96 DOEd, *Descriptive Study*, p. 39.

97 The year 1991–1992 is the most recent year on details about educators of students with limited English proficiency.

98 DOEd, *Descriptive Study*, p. 39.

99 Ibid., p. 43.

100 Ibid., p. 43.

101 National Education Goals Panel, *Data for the National Education Goals Report, Volume One: National Data* (Washington, DC: U.S. Government Printing Office), p. 100, Exhibit 44.

102 Ibid., p. 39.

TABLE 2.7
School Enrollment Rates of English-only Speakers and Members of Language Minorities by English Ability: 1990, by Age Level

		Speak non-English language at home	
	Speak English only	Speak English very well	Speak English with difficulty
Ages 5-14	92.7	93.7	89.2
Ages 15-17	92.9	92.3	83.7
Ages 18-19	65.8	70.2	53.6

Note: English proficiency is determined using responses to the question asked about those who spoke a language other than English at home: "How well does this person speak English?" Possible responses were "very well," "well," "not well," and "not at all." Persons who responded less than "very well" were classified as "speak English with difficulty." *See* U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith et al. (Washington, DC: Government Printing Office, August 1994), p. 308.

Source: Dorothy Waggoner, editor, *Numbers and Needs: Ethnic and Linguistic Minorities in the United States*, vol. 5, no. 4 (Washington, DC: July 1995), p. 1.

limited English proficiency had an average of 7 years teaching students with limited English proficiency (compared to 12 years of teaching overall).[103] Most teachers of students with limited English proficiency held regular elementary (58 percent) and secondary level (40 percent) teaching certifications; while only 10 percent and 9 percent also held certification in bilingual education and ESL, respectively.[104] Almost 45 percent of the teachers held at least a master's degree.[105]

The English language is used by teachers for most of the instruction of students with limited English proficiency.[106] However, 42 percent of teachers of students with limited English proficiency reported that they spoke a non-English language that was also the native language of at least one of their students with limited English proficiency.[107] Most teachers (and sometimes with the use of classroom aides) reported that they modified (adapted or simplified) their instructional methods and the English they used to make it more understandable to students with limited English proficiency.[108]

Achievement and Attainment of Students with Limited English Proficiency Relative to Their More English Fluent Peers

Enrollment

Language minority children who speak English "with difficulty" were less likely than English speakers to be enrolled in school at all levels. For instance, among 5- to 14-year-olds, approximately 93 percent of both students whose only home language is English and language minority students who speak English very well were enrolled in school, compared to 89 percent of their peers who spoke English with difficulty.[109] (See table 2.7.) By high school, the gap between English

103 Ibid., p. 44.

104 Ibid., p. 46.

105 Ibid., p. 45.

106 Ibid., p. 40.

107 Ibid., p. 47.

108 Ibid., p. 40.

speakers and nonspeakers increased. More than 90 percent of English speakers between the ages of 15 and 17 (93 percent of students whose only home language is English and 92 percent of language minority students who speak English very well) were enrolled in school compared to less than 84 percent of language minority students who spoke English with difficulty (see table 2.7). By the time they reach age 18, language minority youth with English-speaking difficulty are very likely not to be enrolled in school: in 1990, only 54 percent of 18- and 19-year-olds in this group were enrolled (see table 2.7). In contrast, 66 percent of the students whose only home language is English and 70 percent of language minority students who speak English very well were enrolled (see table 2.7).

Examining Achievement in Core Subjects

The basic goal of all special programs for students with limited English proficiency is to address their instructional and language education needs and priorities, and prepare them for successful competition in the English-speaking classroom.[110] National norms show how English-speaking students are achieving on standardized tests and on other indicators of performance and attainment. If a formerly limited English proficient student can remain on par with the norms each year, he/she is considered to be successfully competing in the English language environment, because he/she makes as much progress as do comparable English-speaking students.[111]

Students with limited English proficiency are represented disproportionately among low achievers, as measured by standardized tests.[112] Students with limited English proficiency were three times more likely to be low achievers than high achievers.[113] Among students who score below the 35th percentile on nationally normed achievement tests, about 13 percent of the first and third graders, and about 6 percent of the lowest achievers in the seventh grade are classified as limited English proficient. However, fewer than 3 percent of high achieving first graders had limited English proficiency, and the proportion was lower for third and seventh graders.[114]

In-Grade Retention Experiences

Students with limited English proficiency are considered to be at greater risk of poor educational outcomes, especially in the upper grades. About 19 percent of students with limited English proficiency at the middle school level, compared to 9 percent of all students, were enrolled in a grade level at least 2 years behind the average school grade for their age group.[115] At the high school level, almost 27 percent of students with limited English proficiency were assigned to grade levels which were at least 2 years lower than age/grade norms, compared to 11 percent of all students.[116]

Students with limited English proficiency are more likely than others to repeat grades in school: 30 percent of students with limited English proficiency were retained in at least one grade, compared with only 17 percent of their more fluent English speaking peers.[117]

High School Completion and Dropout Rates

In 1992, overall, 11 percent of 16- to 24-year-olds were not enrolled in high school and did not have a high school diploma, or were high school

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109 Waggoner, *Numbers and Needs*, p. 1.

110 *Time to Take a Second Look!*, p. 252.

111 Ibid., p. 252.

112 DOEd, *1993–1994 Biennial Evaluation Report*, p. 201-02. The concept of "low achiever" was not defined.

113 DOEd, *1993–1994 Biennial Evaluation Report*, p. 201–2. The concept of "high achiever" was not defined.

114 DOEd, *1993–1994 Biennial Evaluation Report*, p. 201-2.

115 DOEd, *Descriptive Study*, pp. 6 and 13.

116 Ibid., pp. 6, 13.

117 NABE, *Questions and Answers*, p. 4.

TABLE 2.8
Dropout Rates* for 16- to 24-Year-Olds, by Student Characteristics: 1992

	Speak English only	Speak non-English language at home†		
		All	Speak English very well	Speak English with difficulty
Total** dropout rate	8.8	21.5	11.2	39.7
Never retained	7.1	21.3	10.2	40.5
Retained	19.5	22.3	18.9	32.1

* Percentage who are not enrolled in school and do not have a high school diploma or equivalency certificate.

† English proficiency is determined using responses to the question asked about those who spoke a language other than English at home: "How well does this person speak English?" Possible responses were "very well," "well," "not well," and "not at all." Persons who responded less than "very well" were classified as "speak English with difficulty." *See* U.S. Department of Education, National Center on Education Statistics, *The Condition of Education 1994*, by Thomas Smith et al. (Washington, DC: Government Printing Office, August 1994), p. 308.

** Included in the total are some for whom whether they repeated a grade is unknown.

Source: U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith et al. (Washington, DC: Government Printing Office, August 1994), p. 176.

"dropouts."[118] About 9 percent of 16-to 24-year-old students whose only home language is English were dropouts, compared to 22 percent of language minority students in the same age group. Language minority students who spoke English very well had a high school dropout rate (11 percent) only slightly higher than that of their peers whose home language was English.[119] In contrast, the high school dropout rate for language minority students who spoke English with difficulty was almost four times as high at 40 percent.[120]

Of students who had not experienced an in-grade retention, high school dropout rates were 7 percent for English-only speakers and 10 percent for language minority students with facility in English.[121] (See table 2.6.) The dropout rate was significantly higher (41 percent) for students who were not proficient in speaking English (see table 2.6). Language minority students who had difficulty with English had a lower dropout rate if they had experienced an in grade retention (32 percent) compared to their peers who had not experienced grade retention (41 percent, as shown above) (see table 2.6). Among students who spoke English and had experienced at least one in-grade retention, language minority students who reported that they spoke English very well had a high school dropout rate (19 percent) that was slightly lower than that of students whose home language is English (22 percent) (see table 2.6).

Youth from different countries often bring different educational experiences with them, and they may or may not attend school in this country, depending in part upon their ages at arrival.[122] According to some members of the education community, the risk of failing to complete high school can be related, in part, to the extent to which

118 DOEd, *Condition of Education 1994*, p. 176.

119 DOEd, *Condition of Education 1994*, p. 176.

120 Ibid.

121 Ibid., p. 176.

young immigrants have mastered English prior to arrival or have opportunities to master it in the schools in the United States.[123] Hispanic students in particular were more likely to drop out of school if their families spoke little or no English at home.[124] Almost 33 percent of 16-to-24-year old Hispanics from these families dropped out of high school prior to graduation; yet 14 percent of their Hispanic counterparts whose only home language is English dropped out of high school.[125]

The educational attainment of adults, age 25 or older, reflects a relatively small educational gap between English-only speakers and members of a language minority who speak English "very well."[126] For instance, in 1990, 78 percent and 72 percent of English-only speakers and members of a language minority who speak English "very well" were high school graduates.[127] In contrast, only 42 percent of language minority members with English-speaking difficulty were high school graduates.[128]

Achievement and Attainment After "Exiting" the English Skills Programs

Many school districts that serve students with limited English proficiency do not compare their achievement levels (in areas such as reading, English language arts, mathematics, and science) with those of the general student population.[129] However, in schools that maintain achievement data on former students with limited English proficiency, officials were able to determine how such students compared with their non-language minority peers.[130] Based on the results of the 1990–1991 survey mentioned above, in 53 percent of public schools, former students with limited English proficiency were reported to be performing[131] at levels equal to or above their peers; in 35 percent of schools, former students with limited English proficiency were reported to be performing "somewhat below," while in 6 percent of schools, "considerably below" their peers.[132] In the remaining schools, the performance of former students with limited English proficiency was mixed (i.e., some were performing above and some below their respective English proficient peers.)[133]

OCR Complaints and Compliance Reviews Based on Limited English Proficiency

This section describes the data obtained from OCR's Case Information System (CIS) data base, which includes information on complaints and compliance reviews handled by OCR between fiscal years 1993 and 1995.

Between 1993 and 1995, about 9 percent (1,106) of all complaints received (12,908) by OCR were under the jurisdiction of Title VI with national origin as a basis (see table 2.9). A higher

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122 Waggoner, *Numbers and Needs*, p. 2.

123 Ibid.

124 American Council on Education, *Minorities in Higher Education*, by Deborah Carter and Reginald Wilson (Washington, DC: American Council on Education, June 1995), p. 9.

125 Ibid. "Dropped out" as used here, means not enrolled in high school and not having a high school diploma and GED.

126 Waggoner, *Numbers and Needs*, p. 1.

127 Ibid.

128 Ibid.

129 DOEd, *Descriptive Study*, p. 57.

130 DOEd, *Descriptive Study*, p 58.

131 The concept of "performing" was not explicitly defined for any grade level.

132 DOEd, *Descriptive Study*, p. 58.

133 Ibid., p. 73.

percentage of OCR's compliance reviews cited national origin as a basis. During the 1993–1995 period, approximately 50 percent (174) of all compliance reviews initiated by OCR (348) were based on national origin (see table 2.9).

Similarly, a higher percentage of compliance reviews than of complaints involving elementary and secondary schools were under the jurisdiction of Title VI with national origin as a basis. During the 1993–1995 period, among complaints received that involved elementary and secondary schools (8,414), only 8 percent (675) were based on Title VI/national origin (see table 2.10). In contrast, compliance reviews that cited national origin as a basis were a much higher share (57 percent) of all of the compliance reviews involving elementary and secondary schools (277) (see table 2.10).

Issues pertaining to students with limited English proficiency can be among the issues that cite Title VI as a jurisdiction, with national origin as a basis. Issues related to students with limited English proficiency include: (a) assignment of students with whose primary language is other than English (e.g., identification, language assessment, exit criteria) and (b) special education for LEP students (e.g., evaluation, placement, and services).

The remainder of this discussion focuses on complaints and compliance reviews that raise the issues pertaining to the assignment of students whose primary or home language is other than English and to special education for LEP students. This section does not explicitly address additional issues pertaining to students with LEP, such as program requirements (e.g., academic adjustments, academic evaluation/grading), support services (e.g., counseling and tutoring), and extracurricular activities (e.g., student organizations).

Complaints and compliance reviews can raise multiple issues, and OCR's database maintains separate data on each issue raised in a complaint. The discussion focuses on issues raised in complaints and compliance reviews, as opposed to complaints arising from issues.

During the period from fiscal year 1993 to fiscal year 1995, the issues of assignment of students whose primary or home language is other than English and special education for LEP students were raised frequently in complaints received by OCR, but the issues arose more often in OCR's compliance reviews than in OCR's complaints. The issues were almost always raised in complaints and compliance reviews involving elementary and secondary schools. The issue of assignment of students whose primary or home language is other than English was raised about twice as often as the issue of special education for students with limited English proficiency in complaints, and about five times as often in compliance reviews (see tables 2.11 and 2.12). The two issues represented a small percentage (1.5 percent) of all issues raised in complaints received by OCR, but almost one-half of all issues raised in OCR's compliance reviews during this period (see table 2.13).[134]

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134 *See also* table 2.14, which shows similar patterns for complaints and compliance reviews involving elementary and secondary schools.

TABLE 2.9
Share of OCR Complaints and Compliance Review Activity that Cite National Origin as a Basis

Complaints received	**1993**	**1994**	**1995**	**Total**
National origin	207	497	402	1,106
Total complaints	2,654	5,273	4,981	12,908
Percentage share	7.8	9.4	8.1	8.6
Compliance reviews initiated				
National origin	37	86	51	174
Total compliance reviews	92	161	95	348
Percentage share	40.2	53.4	53.7	50.0

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

TABLE 2.10
Share of OCR Complaints and Compliance Review Activity Involving Elementary and Secondary Schools that Cite National Origin as a Basis

Complaints received	**1993**	**1994**	**1995**	**Total**
National origin	136	303	236	675
Total complaints	1,822	3,456	3,136	8,414
Percentage share	7.5	8.8	7.5	8.0
Compliance reviews initiated				
National origin	34	75	49	158
Total compliance reviews	68	127	82	277
Percentage share	50.0	59.1	59.8	57.0

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

TABLE 2.11
Assignment of Students Whose Primary or Home Language is Other than English and Special Education of LEP Students as Issues Designated in OCR Complaints and Compliance Reviews, by Fiscal Year

Complaints received	**FY 1993**	**FY 1994**	**FY 1995**	**Total**
Assignment of students whose primary or home language is other than English	80	64	94	238
Special education for LEP students	13	42	78	133
Complaints resolved				
Assignment of students whose primary or home language is other than English	28	121	60	209
Special education for LEP students	15	33	54	102
Compliance reviews initiated				
Assignment of students whose primary or home language is other than English	236	384	273	893
Special education for LEP students	36	72	70	178
Compliance reviews completed				
Assignment of students whose primary or home language is other than English	179	216	435	830
Special education for LEP students	–	53	104	157

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

TABLE 2.12
Assignment of Students Whose Primary or Home Language Is Other than English and Special Education of LEP Students as Issues Designated in OCR Complaints and Compliance Reviews Involving Elementary and Secondary Schools

Complaints received	**FY 1993**	**FY 1994**	**FY 1995**	**Total**
Assignment of students whose primary or home language is other than English	80	62	84	226
Special education for LEP students	13	42	76	131
Complaints resolved				
Assignment of students whose primary or home language is other than English	28	121	56	205
Special education for LEP students	15	33	52	100
Compliance reviews initiated				
Assignment of students whose primary or home language is other than English	236	384	268	866
Special education for LEP students	36	71	70	177
Compliance reviews completed				
Assignment of students whose primary or home language is other than English	179	216	414	809
Special education for LEP students	-	53	103	156

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

TABLE 2.13
Issues Pertaining to Students with Limited English Proficiency* as a Percentage of all Issues Raised in OCR Complaints and Compliance Reviews

Complaints received	1993	1994	1995	Total
LEP issues	93	106	172	371
Total issues	6,001	10,029	9,483	25,513
Percentage	1.6	1.1	1.8	1.5
Complaints resolved				
LEP issues	43	154	114	311
Total issues	2,141	11,158	10,997	24,296
Percentage	2.0	1.4	1.0	1.3
Compliance reviews initiated				
LEP issues	272	456	343	1,071
Total issues	607	1,075	580	2,262
Percentage	44.8	42.4	59.1	47.4
Compliance reviews completed				
LEP issues	179	269	539	987
Total issues	287	538	1,276	2,101
Percentage	62.4	50.0	42.2	47.0

* The issues include assignment of students whose primary or home language is other than English and special education for students with limited English proficiency.

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

TABLE 2.14
Issues Pertaining to Students with Limited English Proficiency* as a Percentage of all Issues Raised in OCR Complaints and Compliance Reviews Involving Elementary and Secondary Schools

Complaints received	1993	1994	1995	Total
LEP issues	93	104	160	357
Total issues	4,348	6,938	6,208	17,494
Percentage	2.1	1.5	2.6	2.0
Complaints resolved				
LEP issues	43	154	108	305
Total issues	1,459	7,762	7,523	16,744
Percentage	3.0	2.0	1.4	1.8
Compliance reviews initiated				
LEP issues	272	433	338	1,043
Total issues	431	811	497	1,739
Percentage	63.1	53.3	68.0	60.0
Compliance reviews completed				
LEP issues	179	269	517	965
Total issues	235	413	958	1,606
Percentage	76.2	65.1	54.0	60.0

* The issues include assignment of students whose primary or home language is other than English and special education for students with limited English proficiency

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

Chapter 3

Background

Defining Limited English Proficiency

In recognizing that the term "inability to speak and understand English" must refer not only to a total lack of English language capability, but also to a limited proficiency in the language, policymakers, practitioners, and civil rights enforcement authorities such as OCR, have adopted the term "limited English proficiency." The prevalent use of this term has compounded the challenge of identifying students in need of language assistance programs because it provides a subjective definition for the target group that lacks an appropriate standard of comparison. For example, Congress has provided a statutory definition for the term "limited English proficient" in the Bilingual Education Act. The Bilingual Education Act applies "limited English proficiency" to an individual who meets the following criteria:

> (i) was not born in the United States or whose native language is a language other than English and comes from an environment where a language other than English is dominant; or (ii) is a Native American or Alaska Native or who is a native resident of the outlying areas and comes from an environment where a language other than English has had a significant impact on such individual's level of English language proficiency; or (iii) is migratory and whose native language is other than English and comes from an environment where a language other than English is dominant; and
> (B) who has *sufficient* difficulty speaking, reading, writing, or understanding the English language and whose difficulties may deny such individual the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in our society.[1]

This definition succeeds in reflecting an educational perspective on language proficiency in that it identifies language proficiency in terms of its basic components (e.g., speaking, reading, writing, and comprehension). The Office of Bilingual Education and Minority Language Affairs has noted this definition is limited to a description of students who have limited or no English proficiency relative to a student's inability to function in the all-English classroom.[2] As with similar terminology in the Equal Educational Opportunities Act and OCR policy guidance, this language adopts the consensus that students who have limited English proficiency are those who, by some measure, have insufficient English language capabilities to succeed in an all-English classroom environment.

This definition does not provide a standard against which to measure proficiency relative to the students who are deemed "English proficient." The notion of such a standard of comparison is consistent with an educational perspective for identifying students with limited English proficiency. For example, two educational scholars suggest the term "limited English proficiency" should be defined in law and policy as referring "to the lack of facility, fluency, or linguistic competence in *English as a second language relative to* the normal native speaker-listener of the language."[3]

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1 20 U.S.C. § 7601(8)(A)–(B) (1994) (emphasis added).

2 U.S. Department of Education, Office of the Undersecretary, *The Condition of Bilingual Education in the Nation: A Report to the Congress and the President*, June 30, 1992, p. 10.

Educational research has not produced a single definition for the concepts of "English proficiency" and "limited English proficiency." However, the research underscores the complexity of bilingualism and the acquisition of English for students who are limited English proficient. Education researchers Hamayan and Damico have stated that "[l]anguage proficiency . . . is a complex, multifaceted, multileveled, and variable phenomenon."[4]

Researchers have attempted to understand language proficiency (in English or other languages) in a number of ways.[5] For instance, some researchers have emphasized the importance of distinguishing between proficiency in basic interpersonal communications skills, skills achieved relatively rapidly, and "cognitive/academic" language proficiency, which takes much longer to acquire.[6] As a practical matter, researchers stress that language proficiency can be demonstrated, at a minimum, in four dimensions—listening, speaking, reading, and writing.[7]

One researcher has proposed an operational definition of students with limited English proficiency that encompasses all four dimensions. "[An LEP student is a] student from a home language other than English whose language proficiency is such that the probability of his or her success in a mainstream/regular classroom is less than that of comparable students."[8] Language proficiency is then defined as, "The set of combined skills in four linguistic domains including reading, writing, listening and speaking. The combination of scores from these domains shall be reflective of the continuous natural variation in skill levels for the four domains defining language proficiency."[9] In addition, "comparable students" are defined as "[s]tudents whose scores on standardized tests of academic achievement are at or about the national average or some other agreed upon cutoff score."[10]

Educational researchers also have emphasized that bilingualism can be either "additive" or subtractive."[11] For some children, the second lan-

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3 Robert E. Kretschmer, "Exceptionality and the Limited English Proficient Student: Historical and Practical Contexts," in Else V. Hamayan and Jack S. Damico, eds., *Limiting Bias in the Assessment of Bilingual Students* (Austin, TX: Pro Ed, 1991), p. 5 (emphasis added).

4 Else V. Hamayan and Jack S. Damico, "Developing and Using a Second Language," in Else V. Hamayan and Jack S. Damico, *Limiting Bias in the Assessment of Bilingual Students* (Austin, TX: Proed, 1991), p. 42 (hereafter cited as Hamayan and Damico, "Developing and Using a Second Language").

5 *See generally* Hamayan and Damico, "Developing and Using a Second Language," and John W. Oller, Jr. and Jack S. Damico, "Theoretical Considerations in the Assessment of LEP Students," in Else V. Hamayan and Jack S. Damico, *Limiting Bias in the Assessment of Bilingual Students* (Austin, TX: Proed, 1991).

6 *See* Arnulfo G. Ramirez, "Language Proficiency and Bilingualism," in Raymond V. Padilla and Alfredo H. Benavides, eds., *Critical Perspectives on Bilingual Education Research* (Tempe, AZ: Bilingual Press, 1992); Ed De Avila, "Assessment of Language Minority Students: Political, Technical, Practical, and Moral Imperatives," in Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, *Proceedings of the Research Symposium on Limited English Proficient Students' Issues* (September 1990) (hereafter cited as De Avila, "Assessment of Language Minority Students"); Else V. Hamayan, "Preparing Mainstream Classroom Teachers to Teach Potentially English Proficien: Students," in Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, *Proceedings of the Research Symposium on Limited English Proficient Students' Issues* (September 1990), p. 12 (hereafter cited as Hamayan, "Preparing Mainstream Classroom Teachers").

7 Hamayan and Damico, "Developing and Using a Second Language," p. 41.

8 De Avila, "Assessment of Language Minority Students," p. 232.

9 Ibid., p. 232.

10 Ibid.

11 *See generally* Hamayan and Damico, "Developing and Using a Second Language," pp. 44–47; Kathryn J. Lindholm, "Two-Way Bilingual/Immersion Education: Theory, Conceptual Issues, and Pedagogical Implications," in Raymond V. Padilla and Alfredo H. Benavides, eds., *Critical Perspectives on Bilingual Education Research* (Tempe, AZ: Bilingual Press,

guage is "added on" to the first language without diminishing the child's proficiency in the first language. For other children, however, learning a second language may reduce the child's proficiency in the first language, resulting in the child being "semilingual," or having limited proficiency in both languages.[12] Researchers have found that children who experience subtractive bilingualism often come from lower socioeconomic backgrounds and live in societies that have negative attitudes towards the child's first language.[13]

Furthermore, educational researchers have shown that not all students with limited English proficiency speak their native language better than they speak English.[14] Although the dominant language in the student's home environment may be a language other than English, it does not necessarily follow that the student's level of English proficiency is lower than that of his peers raised in all-English speaking environments. Other factors such as the level of family literacy, regardless of the language of literacy, play an equally important role in determining how a student will succeed in learning English. Moreover, although there is strong evidence indicating the usefulness of bilingualism and the educational advantages of instruction in the child's *stronger* language, or the language in which he or she has a higher level of competency, it must first be determined whether the limited English proficient child in fact possesses stronger skills in another language. One researcher has argued the terms "dominance" and "proficiency" are problematic because neither term has ever been clearly defined.

> While a test of language dominance may be a convenient way to satisfy the legal requirements of *Lau* . . . it tells us nothing about the specific needs of an individual child. A student who ranks in the seventy-ninth percentile in English and the sixty-fifth percentile in Spanish is easily classified as English dominant. The real truth is that the child may have problems in both languages. The failure to distinguish between dominance and proficiency has been pervasive. . .[15]

Other researchers note the following:

> We should not just provide help, but appropriate help. When English speaking students are placed in classrooms where they are taught in a non-English language solely because of their ancestry, they are denied equal educational opportunity. Similarly, when English-speaking students who have problems in school because of non-language home background factors, are

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1992), pp. 197–98 (hereafter cited as Lindholm, "Two-Way Bilingual/Immersion Education"); Barry McLaughlin, "Development of Bilingualism: Myth and Reality," in Andrés Barona and Eugene E. Garcia, eds., *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity* (Washington, DC: National Association of School Psychologists, 1990), pp. 66–69.

12 Hamayan and Damico, "Developing and Using a Second Language," p. 46.

13 Ibid., pp. 46–47; James Crawford, *Bilingual Education: History, Politics, Theory, and Practice* (Los Angeles: Bilingual Educational Services, Inc., 1991), p. 116 (hereafter cited as Crawford, *Bilingual Education*).

14 Heidi Dulay and Marina Burt, "The Relative Proficiency of Limited English Proficient Students," in J. Alatis, ed., *Current Issues in Bilingual Education* (Washington, DC: Georgetown University Press, 1980), pp. 181–200 (hereafter cited as Dulay and Burt, "The Relative Proficiency of LEP Students"). Dulay and Burt report that in a Southern California school district, among 800 Hispanic students identified as "limited English proficient," less than half spoke Spanish better than English. Nearly 40 percent of the "limited English proficient" children spoke no Spanish at all. Ibid.

15 De Avila, "Assessment of Language Minority Students," p. 221. *See generally* D. Ulibarri, "Use of Achievement Tests with Non-Native English Speaking Language Minority Students," in A. Barona, ed., *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity* (Tempe, AZ: University of Arizona Press, 1990); Ed de Avila, "Bilingualism, Cognitive Function, and Language Minority Membership," in P. Homel, M. Pail, and D. Aaronson, eds., *Childhood Bilingualism: Aspects of Linguistic, Cognitive, and Social Development* (Hillsdale, NJ: Lawrence Earlbaum Assoc., 1987); A. Willig, "A Meta-Analysis of Selected Studies on the Effectiveness of Bilingual Education," *Review of Educational Research*, vol. 55, no. 3 (1985); H. Rosenbaum, "The Development and Structure of the Language Skills Framework of the Student Placement System for Bilingual Programs," in J. Alatis, ed., *Current Issues in Bilingual Education, Proceedings of the Georgetown Roundtable on Languages and Linguistics* (1980).

given bilingual instruction as the remedy, they are also denied equal educational opportunity. . . . Theoretically, a child who needs bilingual education or some other form of special language instruction is one who (1) is having problems in English and (2) is a *competent* [emphasis added] speaker of another language. A child who needs compensatory education, on the other hand, is one who (1) is having problems in English and (2) *speaks no other language competently*. Unfortunately, there are no language proficiency tests that can distinguish between these types of students. . . . If a Spanish monolingual, or near monolingual, student 'fails' both the English and Spanish proficiency examinations, the student will be classified as in need of compensatory education when in fact he or she needs second language instruction.[16]

Thus, if a child is not proficient in his or her native language, then some researchers have argued it may be preferable to educate that child in English rather than in the child's native language, provided the child is given special instruction to promote English language development.[17]

To improve the English proficiency of all public school students, it is important to focus on the individual language needs of each child rather than on their racial or ethnic identity. This focus must include the recognition that each child identified appropriately as having limited English proficiency may benefit from any combination of remedial, instructional, or enrichment programs. To ensure each public school student receives a meaningful education regardless of race, national origin, or color, educational programs must be designed to teach students to communicate effectively in English.[18]

A Summary of Educational Approaches to Teaching Students with Limited English Proficiency

There are many different kinds of educational programs designed for teaching students who have limited English proficiency. The pedagogical approaches used in these programs may be divided into two major categories: (1) bilingual education programs which, in general, use two languages as the media for instruction—the native language of the student and the language in which the student has limited proficiency;[19] and (2) English-based programs that do not use the student's native language or offer only minimal exposure to the native language.[20] The Bilingual Education Act authorizes Federal funding for both "bilingual education" programs and for "special alternative instruction programs."[21]

Bilingual Education Programs

The Bilingual Education Act defines bilingual education as

an educational program for limited English proficient students that—

(A) makes instructional use of both English and a student's native language;

(B) enables limited English proficient students to achieve English proficiency and academic mastery of subject matter content and higher order skills, including critical thinking, so as to meet age-appropriate grade-promotion and graduation standards in concert with the National Education Goals.

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16 *See* Christine Rossell and Keith Baker, *Selecting and Exiting Students in Bilingual Education Programs*, 17 J.L. & Educ. 589, 633–23 (Fall 1988) (hereafter cited as Rossell and Baker, *Selecting and Exiting Students*).

17 *See* Dulay and Burt, "The Relative Proficiency of LEP Students," p. 192.

18 *See generally* Rossell and Baker, *Selecting and Exiting Students* at 589–623; Sol H. Pelavin and Keith Baker, "A Study of Procedures Used to Identify Students Who Need Bilingual Education," paper presented at the Annual meeting of the American Educational Research Association, April 1987.

19 National Education Association, "Bilingual Education: An Overview," brochure (no date).

20 Ibid. Although these programs may permit some use of the student's native language, they strive to minimize use of the native language to the greatest extent possible. Hence, for ease of reference, these programs will be referred to as "English-based" programs.

21 20 U.S.C. § 7421 (1994).

(C) may also develop the native language skills of limited English proficient students or ancestral languages of American Indians, Alaska Natives, Native Hawaiians and native residents of the outlying areas; and

(D) may include the participation of English-proficient students if such program is designed to enable all enrolled students to become proficient in English and a second language.[22]

The act's definition of a "bilingual education program" is broad in part because bilingual education is a term that may be used to refer to a wide variety of instructional methods. For example, Congress does not attempt to prescribe the relative *amounts* of time the program will devote to each language. Moreover, although the Bilingual Education Act's definition makes clear that achieving English proficiency must be the primary goal of the program, it does not limit the program's goals to only English proficiency. The objectives of bilingual education programs can range from teaching English proficiency only, to facilitating proficiency in English and the native language, to teaching bilingual proficiency and the history and culture associated with both languages.[23]

Traditionally, bilingual education has encompassed two main approaches: (1) the maintenance or developmental approach, also known as "bilingual immersion," and (2) the transitional approach.[24] The bilingual immersion approach fosters parallel learning in two languages. Its objective is to create bilingual students. Bilingual instructors teach academic subjects in the students' primary language. Students also receive English language instruction. Although it generally takes 2 years for students to develop basic interpersonal communication skills ("playground English"), it usually takes 5 to 7 years to speak English fully. Therefore, the bilingual immersion approach often is used with students in kindergarten through the sixth grade. Proponents of this approach rely on education research supporting the view that this approach enhances students' confidence and subject-matter comprehension.[25]

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22 20 U.S.C. § 7601(18A)–(B) (1994).

23 Michael Rebell and Anne W. Murdaugh, *National Values and Community Values: Part II: Equal Educational Opportunity for Limited English Proficient Students*, 21 J.L. & Educ. 335, 340 (1992) (hereafter cited as Rebell and Murdaugh, *National Values and Community Values*).

24 National Education Association, "Bilingual Education: An Overview," brochure (no date).

25 *See* David J. Ramirez, "Executive Summary of the Final Report: Longitudinal Study of Structured English Immersion Strategy, Early-Exit and Late-Exit Transitional Bilingual Education Program for Language-Minority Children," *Bilingual Research Journal: The Journal of the National Association for Bilingual Education*, vol. 16, no. 1–2 (Winter-Spring 1992), pp. 1–62. This article summarizes a 4-year longitudinal study of over 2,000 elementary students. Ramirez reports that late-exit, or longer term bilingual programs providing primary language instruction seem more beneficial to LEP students more than early exit bilingual programs).
See also Russell Gersten and John Woodward, "A Longitudinal Study of Transitional and Immersion Bilingual Education Programs in One District," *Elementary School Journal*, vol. 95, no. 3 (January 1995), pp. 223–39. Gersten and Woodward describe a longitudinal evaluation of two approaches to educating students whose primary language is other than English and who have limited or no English proficiency: transitional bilingual education and bilingual immersion. The evaluation traced student achievement on the Iowa Tests of Basic Skills from grades four through seven. The results indicated significant effects favoring bilingual immersion in language and reading in grades four through six.
See also Paul Berman, "Meeting the Challenge of Language Diversity. An Evaluation of California Programs for Pupils with Limited Proficiency in English," paper presented at the 73rd Annual Meeting of the American Educational Research Association, San Francisco, CA, Apr. 20–24, 1992. A 2-year study of California's programs for elementary and secondary school students with limited English proficiency found that the state's explosion of limited English proficient students has led to significant classroom innovations. Researchers selected 15 "exemplary" elementary schools which had implemented one of five program models: bilingual late exit, bilingual early exit, double immersion, sheltered English, and English-as-a-Second-Language (ESL) pull-out. The report based on their research concludes that "bilingual programs (Bilingual, Late Exit, Bilingual Early Exit, and Double Immersion, also called Dual Immersion and Two-Way Bilingual) give students most access to the subject curriculum. They noted, on the basis of classroom observations that classes using native language

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A variation of the bilingual immersion approach is "two-way" bilingual immersion, in which both limited English proficient and native English speakers are taught together, each learning the others' language.[26] One author describes two-way bilingual immersion as follows:

> Two-way bilingual programs integrate language minority and language majority students and provide instruction in, and through, two languages. One is the native language of the language minority students (called here the *target* language), and the second is English. These programs provide content area instruction and language development in both languages. In order to achieve the full benefits of two-way bilingual education, students from the two language backgrounds are in each class, and they are integrated for most or all of their content instruction. These programs *provide an environment that promotes positive attitudes toward both languages and cultures and is supportive of full bilingual proficiency for both native and nonnative speakers of English.*" [emphasis added].[27]

The transitional approach, on the other hand, teaches academic subjects in the students' primary language but progressively uses more English. As the students' English-language proficiency increases, the primary language is dropped. This method seeks to place students in English classrooms more rapidly than maintenance or developmental or bilingual immersion approaches.[28]

English-Based Approaches

Among the English-based approaches that do not use the students' native language or offer minimal exposure to the native language, the "English-as-a-Second-Language" (ESL) approach is by far the most commonly used. ESL programs require students to attend one or more classes in which they learn to speak and write in English and they sometimes go over material studied in other classes. All of the students' other classes are conducted in English. Although ESL is used as a component of virtually all transitional and maintenance programs in the United States, it is not, by itself, a bilingual approach nor is it an alternative to studying English. This approach is based on the theory that language is acquired through exposure to comprehensible messages rather than learned through conscious study of syntax and vocabulary.[29]

Another example of educational programs that do not use bilingual techniques is the immersion approach. The immersion approach offers programs for students who lack sufficient English language skills to understand the regular curriculum. Many teachers use Sheltered English, also known as Alternate Immersion, which is a simplified vocabulary and sentence structure to teach school subjects. Teachers also may use the structured immersion method of teaching in English. In structured immersion, the teacher understands the native language and students may speak that language to the teacher. The teacher usually answers only in English. It should be

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instruction tend to operate at higher skill levels than those using the other two program models (Sheltered English, ESL Pull-Out). And finally, native-language models make it easier to involve parents in their children's education." Ibid., p. 2. *See also* Pam McCollum, "Language Use in Two-Way Bilingual Programs," *Intercultural Development Research Association*, San Antonio, Texas, IDRA–Newsletter, vol. 21, no. 2 (February 1994) pp. 1, 9–11. The roles of first and second languages were studied, using ethnographic methods, in a middle school two-way bilingual education program that served Mexican-background students. The primary stated program goal was to develop bilingualism and biliteracy in both minority and majority language students. Classes were taught using English and Spanish on alternate days. The study focused on a core group of 21 Hispanic and 8 white students from working-class backgrounds.

26 *See* Donna Christian, *Two-Way Bilingual Education: Students Learning Through Two Languages* (Santa Cruz, CA: National Center for Research on Cultural Diversity and Second Language Learning, 1994) (hereafter cited as Christian, *Two-Way Bilingual Education*); Lindholm, "Two-Way Bilingual/Immersion Education."

27 Christian, *Two-Way Bilingual Education*, p. 1.

28 Rebell and Murdaugh, *National Values and Community Values*, p. 341.

29 *Id.*

noted, however, that many programs combine ingredients from the bilingual education and English-based approaches in classes. For example, some programs combine bilingual techniques with immersion. Such programs are referred to as "bilingual-immersion."[30]

A final example of English-based approaches is submersion, which places students in classes conducted entirely in a language that is not the students' native language. Critics dub submersion as the "sink or swim" method because there is no effort to make language comprehensible to students.[31]

The two main approaches to instructing students with limited or no English proficiency, bilingual education and English-based approaches, cover a broad spectrum of methodologies and goals. Each methodology is designed to assist in developing English proficiency. The greatest distinction between these two approaches is that bilingual education programs can be designed to assist students in maintaining and/or developing their native language. At the very least, programs using bilingual techniques afford students far more access to their native language in instruction.

The controversy over native language instruction in educational programs for students with limited English proficiency reflects a continuing debate over its educational effectiveness and viability as a goal.[32] Bilingualism as a goal remains controversial for education researchers and policymakers alike. Controversy exists on whether programs promoting bilingualism provide the most effective means of meeting the educational needs of students with limited or no English proficiency. Debate continues today on whether bilingualism is necessary to provide equality of educational opportunity for these students.

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30 *See generally* Christian, *Two-Way Bilingual Education*; Russell Gersten, John Woodward, and Susan Schneider, *Bilingual Immersion: A Longitudinal Evaluation of the El Paso Program* (Washington, DC: The Read Institute, Inc., 1992); Lindholm, "Two-Way Bilingual/Immersion Education."

31 Rebell and Murdaugh, *National Values and Community Values*, p. 340.

32 The concerns over attaining bilingualism arise in part from the difficulties in implementing successful programs. Part of the reason for these difficulties is that only some people who study a second language actually become proficient in it. One researcher has described the problem as one of avoiding 'semilingualism.' This term refers to a state in which skills are below expected levels of proficiency in both languages. She has discussed the problem in this way: "[T]he term 'bilingualism' actually refers to different levels of proficiency in the two languages involved. Different types of bilingualism are possible. One type of bilingualism is exemplified by the learner who has attained an equal level of proficiency in more than one language, referred to as 'balanced bilingualism.' This type of bilingualism is the exception rather than the rule because it is more likely for bilinguals to have one dominant language, that is, to have a higher level of proficiency in one language or, more specifically, in some aspects of one language. . . . The attainment of proficiency in two languages also manifests itself in different ways. When a second language is learned after the speaker has acquired the first, two types of bilingualism may occur—'*additive*' or '*subtractive*' [emphasis added] (Lambert 1977). In *additive* bilingualism, learners who have attained the expected level of proficiency in their first language simply add on a second language to their existing repertoire in the first language. In contrast, in *subtractive* bilingualism, the development of proficiency in the second language has inhibiting and sometimes detrimental effects on the first language. Subtractive bilingualism may even result in. . . a state that some researchers refer to as 'semilingualism.'. . . To ensure that semilingualism, which has detrimental effects on a student's emotional, cognitive, linguistic and academic development (Paulston, 1980) does not occur, schools must promote additive forms of bilingualism. . . . The educational strategy that best overcomes subtractive bilingualism and resulting semilingualism is that of valuing and allowing the development of the students' native languages (Cummins, 1986)." Hamayan, "Preparing Mainstream Teachers," p. 36 (citing W.E. Lambert, "The Effects of Bilingualism on the Individual: Cognitive and Sociocultural Consequences," in Hornby, ed., *Bilingualism: Psychological, Social, and Educational Implications*, (New York, NY: Academic Press, 1977); C.B. Paulston, *Bilingual Education: Theories and Issues* (Rowley, MA: Newbury House, 1980); J. Cummins, "Empowering Students: A Framework for Intervention," *Harvard Educational Review* (February 1986), pp. 18–36).

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The National Policy Debate Over Bilingual Education for Students with Limited or No English Proficiency

History of the Debate

Federal law and policy have required local school districts to provide instructional assistance to students in overcoming their language barriers.[33] However, the standards governing how schools provide that assistance remain broad. School districts have retained discretion in determining which type of educational approach to implement in teaching students with limited or no English proficiency. They also have maintained a prerogative to adopt goals beyond the fundamental goal of teaching English proficiency.

There remains a debate regarding the extent of separation required from a school's regular educational program for students having limited or no English proficiency. This debate has manifested itself in a controversy over the goals of instructional programs for students with limited English proficiency. It is a debate that has existed since passage of the Bilingual Education Act in 1968.[34] Education experts and State and local officials testified before Congress as it considered passage of the act. They agreed with parents and community leaders that students with limited English proficiency have suffered a long history of educational failure.[35] The witnesses, however, differed distinctly on the question of how to remedy this situation. Some education experts felt that the low achievement scores and high dropout rates of Hispanic students indicated the need for compensatory programs designed to integrate Hispanic students into the educational mainstream more effectively. These experts supported bilingual education as a means of promoting assimilation through the acquisition of English.[36] Others saw bilingual education as a means of fostering linguistic and cultural diversity through multilingual, multicultural instruction. Under this approach, bilingual education initiatives would not be defined as compensatory or remedial, but rather as a useful skill that could benefit every child.[37]

The Current Debate

The development and implementation of educational programs for students with limited English proficiency, particularly with regard to the methodology and goals of such programs, has grown more controversial since the original passage of the Bilingual Education Act in 1968.[38] The

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33 Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1994); Lau v. Nichols, 414 U.S. 563 (1974); the Equal Educational Opportunities Act, 20 U.S.C. §§ 1701–1721 (1994); the Bilingual Education Act, 20 U.S.C. §§ 7401–7602 (1994).

34 The Bilingual Education Act of 1968, an amendment to the Elementary and Secondary Education Act of 1965 (ESEA), added as Title VII of the ESEA, Pub. L. No. 90–247, 81 Stat. 783 (1968).

35 Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 Cal. L. Rev., 1249, 1262 (December 1988).

36 *Id.* (citing *Bilingual Education: Hearings on S. 428 Before the Special Subcomm. on Bilingual Educ. of the Senate Subcomm. on Labor & Public Welfare*, 90th Cong, 1st Sess. 1, 15–16 (1967) [hereafter *1967 House Hearings*] (remarks of Sen. Paul J. Fannin of Arizona); *1967 Senate Hearings*, at 622 (prepared statement of Claude Ury, Educational consultant in Berkeley, California)). Moran notes that "Senator Fannin's views were consistent with those of other witnesses who termed the inability to speak English a handicap and sought to assimilate linguistic minority students more effectively into the American mainstream." *Id.*

37 *Id.*

38 *See* Crawford, *Bilingual Education*, p. 13 (writing "[t]here is more at stake here than questions of educational effectiveness. Bilingual education is arousing passions about issues of political power and social status that are far removed from the classroom. Rarely in American history has language been the focus of so much contention. Why is this happening. . . ? One reason is that, with little public discussion, the Bilingual Education Act reversed our 200-year-old tradition of laissez-faire toward language. Also, it appeared to contradict treasured assumptions about the Melting Pot, or more accurately, about the Anglo-conformist ethic in American culture. The law's goals were unclear. Was it intended to ease the transition to

current debate necessarily implicates several important aspects of program implementation. For example, the goal that is sought will play a crucial role in determining how much native language instruction will be used. In turn, the amount of native language used will influence the level of segregation from the school's regular educational program for students having limited or no English proficiency. This debate also centers on the issue of whether the teachers should have bilingual abilities or English fluency only. Educational experts and policymakers on both sides of the debate have defended their positions with arguments over how best to provide these students with equal educational opportunity.[39]

The fifth circuit in *Castaneda v. Pickard* clearly defined this debate when it stated that:

> We note that Congress enacted the Bilingual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act. Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, does not specify that a state must provide a program of 'bilingual education' to all limited English speaking students. We think Congress' use of the less specific term, 'appropriate action,' rather than 'bilingual education,' indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, *Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students* and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.[40]

On one side of the debate are those who emphasize a focus on English language learning through the use of primarily English instruction. They believe bilingual education has not improved the educational opportunities for students with limited English proficiency because it relies too heavily on native language use in instruction. This group's most visible advocates have been the members of the "English-only" movement and other advocates of an emphasis on English-language acquisition. The nonprofit organization known as U.S. English, together with its research arm, the Institute for Research on English Acquisition and Development (READ), have spearheaded the English-only movement.[41] Advocates

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English or to encourage the maintenance of minority languages? For some, bilingual education was strictly a remedial effort, designed to overcome children's "language deficiency" and to assimilate them quickly into the mainstream. For others, it was an enrichment program, intended to develop students' linguistic resources and to preserve their cultural heritage. Rather than settle a debate, the new policy started one, and it has intensified in recent years.").

39 The debate over the amount of native language use in instructional programs is a complicated one. It encompasses a broad spectrum of viewpoints. However, for purposes of this report, those positions that favor limiting native language instruction will be termed "advocates of English-based education. Those that favor the use of native language instruction, whether in an effort to foster native language fluency and native cultural knowledge or whether only because they believe it can increase effectiveness in achieving English proficiency, will be deemed "advocates of bilingual education."

40 648 F.2d 989, 1009 (5th Cir. 1981) (emphasis added).

41 U.S. English is a private, nonprofit organization that "believes that a shared language provides a cultural guidepost that we must maintain for the sake of our country's unity, prosperity, and democracy" and whose stated goals are: (1) "to work with federal and state legislatures to enact polices that save taxpayers the costs of duplicating government activities in every language. Money wasted on government duplicated in multiple languages is money better spent teaching non-English speakers our common language" and (2) "to promote and expand opportunities for all residents to learn English." U.S. English, "Facts and Issues" (undated brochure).
U.S. English was founded in 1983 as an offshoot of the Federation for American Immigration Reform (FAIR), a Washington, DC-based lobby that advocates tighter restrictions on immigration. Former U.S. Senator, S.I. Hayakawa, the first sponsor of the English Language Amendment, and Dr. John Tanton, a Michigan ophthalmologist, environmentalist, and population control activist founded U.S. English in 1983. Tanton had started FAIR in the late 1970s. By 1988, U.S. English had outgrown its parent organization and was claiming a dues-paying membership of 350,000 and an annual budget of

of this view believe that instructional programs for students having limited English proficiency should strive to attain English language fluency as quickly as possible.[42] They emphasize the need for all students to achieve written and oral proficiency in English because a lack of English language fluency may limit economic and employment opportunities in the United States. Advocates of this position note "English fluency is the best predictor of economic well-being."[43]

Advocates of English-based education also argue bilingual programs have proven ineffective both in teaching English to students with limited or no English proficiency and in raising retention rates and academic performance.[44] At a 1993 congressional hearing on bilingual education, Rep.

$7 million. U.S. English has developed into the most vocal and organized force in opposition to bilingual education. Crawford, *Bilingual Education*, p. 54 and Rosemary C. Salomone, *Equal Education Under Law: Legal Rights and Federal Policy in the Post-Brown Era* (New York: St. Martin's Press, 1987), p. 95.
In 1989, U.S. English launched the Institute for Research on English Acquisition and Development (READ). The Institute serves as a think-tank. It has commissioned numerous research projects conducted by academic critics of bilingual education such as Christine Rossell of Boston University. In 1991, Rosalie Porter, author of *Forked Tongue: The Politics of Bilingual Education*, which was critical of bilingual education practices and programs, took over as head of READ. In addition to funding from U.S. English, READ receives grants from the Laurel Foundation, the major benefactor behind U.S. English and the Federation for American Immigration Reform. *See* Crawford, *Bilingual Education*, pp. 209–10.

42 *See generally* Statement of Mauro E. Mujica, Chairman, U.S. English, "On the Reauthorization of the Bilingual Education Act," before the Subcommittee on Elementary, Secondary and Vocational Education, Aug. 3, 1993. Speaking on behalf of U.S. English Mr. Mujica stated that: "U.S. English supports the original intent of the Bilingual Education Act: to teach English to non-English speaking children quickly, to help them integrate into the school community and become part of our English-based educational system as soon as possible." *Id.*
See also Linda Chavez, President, Center for Equal Opportunity, interview in Washington, DC, June 4, 1996 (hereafter cited as Chavez interview). In explaining how the Center for Equal Opportunity, a Washington based think tank that espouses the English-only view, seeks to influence educational policy and practice, Ms. Chavez stated that "[w]e would see the primary objective [as being] early acquisition of English, moving the child into the educational mainstream, having that child be in an integrated setting as quickly as possible, where the child would be receiving his or her instruction in English and able to function in that language. That ought to be the goal and the method that most quickly moves the children in that direction would be the one that we would favor." Ibid.

43 Linda Chavez, "Bilingual Ed the Real Culprit," *USA Today*, Sept. 6, 1995, p. 13A. Ms. Chavez, Director of the Center for Equal Educational Opportunity, a policy think-tank located in Washington, DC, claims that among Hispanic Americans, for example, "those who speak English fluently earn virtually the same average income as non-Hispanic whites." Ibid.

44 *See* Robert E. Rossier, "A Critique of California's Evaluation of Programs for Students of Limited English Proficiency," in *READ Perspectives*, vol. 2, no. 1 (Spring 1995), p. 27 (hereafter cited as Rossier, "A Critique of California's Evaluation of Programs for LEP Students") (stating that: "Data collected over a 2-year period (1989–1990) show generally poor results for bilingual education programs in California, but the study too easily attributes the disappointing outcomes to lack of sufficient resources without considering the possibility that it is even more likely the fault of the unsound theoretical foundation upon which bilingual education exists.") Rossier also notes that the "submersion" technique in which students having limited English proficiency are placed in mainstream classes without any special language instruction program such as bilingual education or ESL, "is probably the most commonly used" in California schools. Such programs are commonplace "because there are too few students speaking the same language to warrant the establishment of a bilingual program." Ibid., p. 31. Rossier notes further that the studies of Baker and De Kanter show that "in some districts LEP students in mainstream classrooms learned English and mastered school subjects better and faster than comparable students in bilingual classrooms.") (citing K. Baker and A. De Kanter, *Bilingual Education" A Reappraisal of Federal Policy*, (Lexington, MA: D.C. Heath, 1983)); *see generally*, *READ Perspectives*, Spring 1995, vol. II, no. 1; Patricia Gandara and Barbara Merino, "Measuring the Outcomes of LEP Programs: Test Scores, Exit Rates, and Other Mythological Data," *Educational Evaluation and Policy Analysis*, vol. 15, no. 3 (Fall 1993), pp. 320–38; Christine H. Rossell, "Nothing Matters?: A Critique of the Ramirez et al. Longitudinal Study of Instructional Programs for Language-Minority Children," *Bilingual Research Journal: The Journal of the National Association for Bilingual Education* vol. 16, no 1–2 (Winter/Spring 1992) pp. 159–86 (hereafter cited as Rossell, "Nothing Matters") (criticizing the Ramirez et al. study of bilingual programs for its serious research flaws. She calls into question the findings of no consistent difference in the achievement of language-minority children regardless of how much Spanish or English is used in instruction. She proposes a reanalysis of the Ramirez data.); Rossell and Baker, *Selecting and Exiting Students*; Christine H. Rossell and J. Michael Ross, *The Social Science Evidence on Bilingual*

Toby Roth (R–Wis.) stated "it simply defies the evidence to say that bilingual education teaches students of English better than other methods . . . Advocates of bilingual education demand these programs continue despite their virtually unbroken record of failure."[45] Another witness at this hearing, Sally Peterson, President, Learning English Advocates Drive (LEAD) testified:

[m]ost native-language based bilingual education programs are a dismal failure. . . . Advocates of long-term native language based bilingual education will tell you theirs is the most successful method of helping language minority children enter the educational mainstream. I tell you that, at best, native-language based bilingual education is no better than any other method. For most children it is a whole lot worse. . . . I challenge the advocates of bilingual education to show us their cards. They have been gambling with the lives of mostly Hispanic children for 25 years. LEAD is calling their bluff. Let them come forward and silence their critics once and for all. We want to know why only 3 percent of Hispanic California high school graduates go on to college. We want to know why the dropout rate among Hispanics before the tenth grade is about 40 percent, the same as it was when this great bilingual education experiment began. By means of comparison, the dropout rate among blacks has dropped dramatically over the last 20 years. The major difference between the educational programs of blacks and Hispanics is—bilingual education.[46]

Advocates of English-based education suggest the reasons for the failures of bilingual education lie in the methodology used in research evaluating bilingual education programs. For instance, well-known political scientist Christine Rossell, has criticized research findings supporting the use of bilingual education techniques as being based on seriously flawed research.[47] Rossell argues specifically that the methodology is faulty in its premise that a program can teach English proficiency while relying on heavy amounts of the native language in instruction.[48] Rossell has

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Education, 15 J.L. & Educ. 385 (Fall 1986) (hereafter cited as Rossell and Ross, *The Social Science Evidence on Bilingual Education*).

45 *See* Statement of Rep. Toby Roth (R–Wis), Hearing on Bilingual Education, Elementary, Secondary, and Vocational Education Committee, July 22, 1993, Washington, DC.

46 *See* Statement of Sally Peterson, President, Learning English Advocates Drive (LEAD), Hearing on Bilingual Education, Elementary, Secondary, and Vocational Education Committee, July 22, 1993, Washington, DC.

47 *See* Rossell, "Nothing Matters," pp. 159–66. However, advocates of bilingual education also criticize the methodology used by the English-only researchers. *See* Virginia P. Collier, "A Synthesis of Studies Examining Long-Term Language Minority Student Data on Academic Achievement," *Bilingual Research Journal*, vol. 16, nos. 1&2 (Winter/Spring 1992).

48 *See* Rossell, "Nothing Matters?," pp. 159–86.
See also Rossell and Baker, *Selecting and Exiting Students*. Rossell and Baker trace the entry and exit criteria of transitional bilingual education programs through Federal court decisions, laws, and regulations over the past decade. They examine the validity of the rules used to decide who needs transitional bilingual education.
See also Christine H. Rossell, "The Problem with Bilingual Research: A Critique of the Walsh & Carballo Study of Bilingual Education Projects," *Equity & Excellence*, vol. 23, no. 4 (Summer 1988), pp. 25–29 (hereafter cited as Rossell, "The Problem with Bilingual Research"). Rossell argues that researchers Walsh and Carballo had not proven their claim that TBE was effective. Despite their claim to the contrary, Walsh and Carballo in their report, "Transitional Bilingual Education in Massachusetts: A Preliminary Study of Its Effectiveness" (1986), did not demonstrate the superiority of bilingual education because their study was marred by a number of problems, here identified.
See also Rossell and Ross, *The Social Science Evidence on Bilingual Education*, at 385–86 (arguing that much of the research evaluating bilingual education is flawed because it is usually based on "local evaluations with inadequate research designs" and "evaluators and those who review and integrate the research, are also passionate advocates of bilingual education for political or ideological reasons.).
Rossell and Keith Baker have examined the value of transitional bilingual education (TBE) in the context of two competing theories of second language learning: (1) first language (L1) knowledge facilitates second language (L2) learning; and (2) the best way to learn English is to maximize time spent using it. Rossell and Baker found the facilitation theory flawed in light of recent research. They proposed two new hypotheses to be tested by research. The hypotheses are: (1) native language instruction should be minimal and used only in early instruction, and (2) teachers who are familiar with but not fluent in

stated she believes there is no consistent difference in the achievement of language minority children regardless of how much Spanish or English is used in instruction.[49]

Advocates of English-based education contend bilingual education programs are bound to fail in teaching English language proficiency because the programs rely *too* heavily on native language instruction. Thus, bilingual programs serve only to create further dependency on the native language while failing to provide proficiency in English. Moreover, learning in students' native language takes valuable time required for learning other academic subjects. Students cannot afford to fall even further behind in grade requirements than their English-proficient counterparts.

Advocates of English-based education also criticize bilingual programs for promoting segregation.[50] For example, in testimony before Congress on the reauthorization of the Bilingual Education Act, Mauro E. Mujica, Chairman, U.S. English, stated native language based bilingual education programs segregate, involuntarily, students with limited English proficiency into "separate-but-equal" classes.[51] Another witness at the reauthorization hearing, Gloria Marta Tuchman, stated segregation is a problem associated with bilingual education and "what's more, segregation didn't work in the South. Segregating language-minority children who are just starting out, and are in search of a fragile, illusive self-identity and hungry for challenge and knowledge, is a living contradiction to everything education and learning is all about."[52]

One critic of bilingual education argues that by requiring a separate instructional program outside of the school's regular educational program, schools will isolate students with limited or no English proficiency. Further, by providing students with too much instruction in the native language and creating more dependency on that language, schools will allow existing barriers to remain. Students with limited English proficiency will continue to face difficulties in communicating with the English-proficient, in accessing regular educational programs, and in transitioning into a predominantly English-language culture.[53]

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the child's native language are better teachers of limited English proficient students. *See* Keith Baker and Christine H. Rossell, "Blinded by Theory in the Search for Effective Programs for LEP Students: A Call for Testing New Research Hypotheses," paper presented at the Annual Meeting of the American Educational Research Association, Atlanta, GA, Apr. 12–16, 1993; *see also* Christine H. Rossell, "Measuring the Outcomes of Students Whose Primary Language is Other than English and Who Have Limited or No English Proficiency Programs: Test Scores, Exit Rates, and Other Mythological Data," *Educational Evaluation and Policy Analysis*, vol. 15, no. 3 (Fall 1993), pp. 320–38.

49 *See* Rossell, "The Problem with Bilingual Research," pp. 25–29.

50 *See* Rossier, "A Critique of California's Evaluation of Programs for LEP Students," pp. 42–43 (In arguing the ineffectiveness of bilingual programs in California schools and the inadequate assessment of California's instructional program for students with limited or no English proficiency in the California Department of Education report, *Meeting the Challenge of Language Diversity: An Evaluation of Programs for Pupils with Limited Proficiency in English* (1992), Rossier claims that: "The review of the elementary programs for limited-English students revealed that many of the schools did not reclassify (exit them from the bilingual program with appropriate skills to work in mainstream classrooms) . . . Because of the lack of opportunities for reclassification many students remain in the LEP programs until they drop out of school . . . The current limited-English students are not only being denied the extensive English language teaching that used to be available to immigrant students, but also have more limited opportunities to interact linguistically with English speakers than did students in the past. This results, in turn in delaying their ability to take mainstream classes.").

51 *See* Statement of Mauro E. Mujica, Chairman, U.S. English, on the Re-Authorization of the Bilingual Education Act, House Committee on Education and Labor, Subcommittee on Elementary, Secondary, and Vocational Education, Aug. 3, 1993, Hearing on Bilingual Education, p. 106.

52 *See* Statement of Gloria Marta Tuchman, "The Effectiveness and Efficiency of the Bilingual Programs for Language Minority Students and L.E.P. Students: A Statement to the Chairman of the Elementary, Secondary, and Vocational Education Subcommittee on the Reauthorization of the Bilingual Education Act for 1993," Hearing on Bilingual Education, p. 118.

53 *See* Rossier, "A Critique of California's Evaluation of Programs for LEP Students," pp. 42–43.

Another critic argues that bilingual programs place an enormous financial burden on school districts and State and Federal resources.[54] Such programs are a drain on scarce resources for State and local school districts who must provide bilingual teachers to instruct students in two languages. Further, it is unrealistic for public agencies and the media to provide information in other languages as well as in English. Proponents of "English-only" suggest students whose dominant language is other than English may take courses to "re-learn" their native language as students in one of the "foreign language" courses typically offered to U.S. students at the middle and high school level. Critics of bilingual education contend that this scheme for foreign language instruction, where students take courses for a few years at the middle and high school level, is a sufficiently high education standard for U.S. students. Proponents of English-based approaches view English language as the overwhelming priority. For students who, after acquiring English proficiency, choose to learn the language spoken by their parents or grandparents, typical middle or high school foreign language instruction should adequately serve their needs. According to one proponent of this view, maintaining a native language other than English in a predominantly English-speaking environment is extremely difficult and perhaps too high a goal for most students to seek.[55]

The policy debate over bilingual education has raged fiercely in States with large populations of students with limited English proficiency such as California, where policymakers who disfavor bilingual education have joined with some Latino parents to form a coalition to end or substantially reform bilingual education within the State.[56] News reporting, editorials, and polling data in the California and national media show that these Latino parents believe bilingual education is not adequately addressing their children's language barriers and seek to have their children removed from bilingual education classes.[57] For example, in an opinion piece appearing in the *Los Angeles Times* in July 1997, Rubin Navarette, an author and essayist, observed that Latino parents in Orange County, California have largely rejected bilingual education as a means of addressing their children's language barriers.[58] Navarette's piece cited a *Los Angeles Times* poll which showed 83 percent of Latino parents in Orange County favored English-language instruction as soon as

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54 *See* Statement of Rep. Toby Roth (R–Wis), Hearing on Bilingual Education, Elementary, Secondary, and Vocational Education Committee, July 22, 1993, Washington, DC, p. 46 (stating in reference to bilingual education programs that: "These failed programs cost a good deal of money. Direct government support for bilingual education totaled $228 million for this fiscal year. An estimate offered in 1990 during a congressional hearing on bilingual education suggests that this is but 20 percent of the total cost of these programs. In other words, real spending on bilingual programs is probably well over $1 billion annually.").

55 Chavez interview (stating that: "[i]t is *extremely* difficult, over the course of time, to maintain a native language in an English-speaking environment. It is even more difficult to develop real literacy in that native language. If I had to choose one or the other, I would choose acquiring English as the overriding concern.").

56 *See* Lou Cannon, "Bilingual Education Heading to California Precipice," *The Record*, Aug. 3, 1997, p. 005.

57 *See* Rubin Navarette, Jr. "A Bilingual Education Initiative As A Prop. 187 in Disguise?," *The Los Angeles Times*, Sunday, July 6, 1997, p. M6 (hereafter cited as Navarette, "A Bilingual Education Initiative As A Prop. 187 in Disguise?"); Alice Callaghan, "Desperate to Learn English, *The New York Times*, Aug. 15, 1997, p. A31 (hereafter cited as Callaghan, "Desperate to Learn English"); Gary M. Stern, "Immigrant Parents Challenge Bilingual Education," *Hispanic Outlook*, vol. 6, no. 9 (Jan. 5, 1996), pp. 6–8; Lynn Schnaiberg, "Parents Worry Bilingual Education Hurts Students," *Education Week*, vol. 15, no. 23 (Feb. 28, 1996), p. 1, pp. 10–11 (hereafter cited as Schnaiberg, "Parents Worry Bilingual Education Hurts Students,"); K.L. Billingsley, "Hispanic Parents Battling to Stop Bilingual Classes," *The Washington Times*, Sunday, Feb. 18, 1996, p. A5. *See also* chap. 5 for a full discussion of the role of parents in the education of students with limited English proficiency.

58 *See* Navarette, "A Bilingual Education Initiative As A Prop. 187 in Disguise?," *Los Angeles Times*, July 6, 1997, p. M6.

their children begin school, while only 17 percent of Orange County parents supported native-language instruction.[59]

Proponents of initiatives to end bilingual education in the State of California credit the opposition of some Latino parents to bilingual education as a main impetus for introducing such measures.[60] For example, in July 1997, Roy Unz, a California software entrepreneur, and Gloria Matta Tuchman, a long-time California school teacher, launched a campaign for a June 1998 ballot initiative that would require California public schools to conduct all instruction in English unless a parent can prove a child would learn faster or more effectively through an alternative approach, possibly a bilingual one.[61] Unz publicly stated he designed the initiative to ensure "parents get their wish," referring to a February 1996 boycott of Los Angeles' Ninth Street School in which Latino parents kept their Spanish-speaking children out of school until the school agreed to remove the students from bilingual education classes and place them into all-English classes.[62] The *Los Angeles Times* reported Unz also said his initiative was prompted by public opinion polls showing Latino parents want their children in English-only programs and by statistics indicating bilingual programs graduate only 5 percent of their children annually into regular classes.[63]

Around the country, some parents of language minority children, like their counterparts in California, have spoken out in favor of ending or at least reforming bilingual education programs where they have assessed significant problems with the educational effectiveness of a bilingual education program. One such problem has been where the program has failed to teach either English or a student's native language well.[64] For example, in New York, language minority parents discovered that some of their children served by the city schools' bilingual education program were scoring lower in English proficiency at the end of a school year than at the beginning.[65]

Also in New York, the 150-member (predominantly Hispanic) Bushwick Parents Organization in New York City's School District 32, reported in 1996 that bilingual education teachers could not communicate in English.[66] Although the organi-

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59 *See* ibid. The results of the *Los Angeles Times* poll were reported widely in the news media. For example, the *New York Times* reported them in an article which stated also that "[t]hroughout California and elsewhere in the country, many Hispanic parents are worried that bilingual education programs are keeping their children from learning English . . ." *See* Callaghan, "Desperate to Learn English," *The New York Times*, Aug. 15, 1997, p. A31. *See also* Hal Netkin, "English Language Not Taught Here," *Wall Street Journal*, July 24, 1997, p. A18.

60 *See* Amy Pyle, "Campaign Targets Bilingual Education: Former Gubernatorial Candidate Ron Unz and Teacher Gloria Matta Tuchman Unveil Petition Drive for 1998 Initiative," *The Los Angeles Times*, Wednesday, July 9, 1997, p. B2 (hereafter cited as Pyle, "Campaign Targets Bilingual Education").

61 Ibid.

62 Ibid.

63 Ibid.

64 Schnaiberg, "Parents Worry Bilingual Education Hurts Students," p. 1.

65 Ibid., p. 11.

66 Ibid., p. 10. Many bilingual education programs are "bilingual" in name only because the teachers also lack fluency in their students' native language. *See* James Crawford, *Bilingual Education: History, Politics, Theory, and Practice* (Los Angeles: Bilingual Educational Services, Inc., 1991), p. 12 (hereafter cited as Crawford, *Bilingual Education*). In the Denver, Colorado, public schools, some teachers who provide students with limited English proficiency instruction in their English language classes are not bilingual. *See* Lynn Schnaiberg, "Denver Hispanics Assail Bilingual Ed. Plan," *Education Week*, vol. 16, issue 31 (Apr. 30, 1997), pp. 6–7 (hereafter cited as Schnaiberg, "Denver Hispanics Assail Bilingual Ed. Plan"). In fact, according to the Denver schools' general counsel, although some teachers accept their positions with the school system under the premise that they will be "fully trained" within 2 years, many instead use their bilingual education assignments to launch their career, with the intention of eventually obtaining an alternate teaching position within the district. Ibid. In various bilingual education programs, monolingual teachers are concerned about "reassignment, loss of status, or other

zation does not want bilingual education eliminated, it stresses that programs should be shorter,[67] and voices concern that participants (i.e., their children) in the city school system's English language acquisition services graduate from school with poor reading skills in both English and Spanish.[68]

Elsewhere, reports in the news media indicate language minority parents have sought to have their children removed from bilingual education classrooms or at least that parents have more involvement in bilingual programs once they have been implemented. For example, in 1996, in Omaha, Nebraska, Hispanic parents reacted against that school district's bilingual education program, and stated they wanted their children to participate in English-based programs.[69] A parent group in Princeton, New Jersey, lobbied the State legislature to allow parental discretion in previously mandatory bilingual education programs.[70]

Finally, in Denver, Colorado—where approximately 20 percent of the district's 64,000 students are limited English proficient, and the majority of these students are native Spanish speakers[71]—the Latino Education Coalition, an umbrella group which represents the city's growing Hispanic population and promotes "educational equity and justice," is concerned that the schools' bilingual education programs are implemented ineffectively.[72] The Hispanic community activists' 1997 protests were supported by the city school

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career setbacks." *See* Crawford, *Bilingual Education*, p. 14.

67 With respect to program duration, in some of the Nation's school systems, such as District 32 in New York City, bilingual education programs have been charged with detaining students for more than 6 years (the maximum amount of time that New York State will fund English language acquisition classes for students with limited English proficiency). *See* Schnaiberg, "Parents Worry Bilingual Education Hurts Students," p. 10. Between 1993 and 1996, approximately 5 percent of New York City's limited English proficient students remained in English language acquisition classes for more than 6 years. Ibid., p. 11.
A study conducted in the mid-1990s on New York City's schools revealed that 80 percent of language minority students who were served in intensive English programs were able to enroll in regular education classes within 3 years, compared to only 51 percent of children who participated in bilingual education programs. *See* "Bilingual Education Study Draws Fire from Critics," *Education Daily* (Mar. 15, 1995), p. 5. Similarly, an evaluation conducted by the U.S. General Accounting Office and a study on California schools revealed there is insufficient evidence to support the effectiveness of native language over English instruction. Ibid., p. 5. Overall, according to the Institute for Research in English Acquisition and Development (READ), English instruction programs have the potential to better serve LEP students than bilingual instruction programs.

68 Schnaiberg, "Parents Worry Bilingual Education Hurts Students," p. 10. Although there is evidence language minority children can achieve at or near grade level when they exit a "well designed" bilingual education program, academic results of bilingual programs can be "disappointing." *See* Crawford, *Bilingual Education*, p. 12. Approximately 25 percent of the 16,000 pre-K–8 students in New York City's District 32 were limited English proficient in the 1994–1995 school year and their reading scores in both English and Spanish tend to be below average. *See* Schnaiberg, "Parents Worry Bilingual Ed. Hurts Students," p. 10. Note: The author did not report if LEP students' average scores were below a national, State, or district average.
Students from language minority backgrounds tend to "fall behind" and have higher dropout rates than their more English fluent peers. *See* Crawford, *Bilingual Education*, p. 14. For instance, in 1988, students from non-English backgrounds were 1.5 times as likely as their more English fluent counterparts to withdrawal from school prior to high school graduation. Ibid. Data from 1992 revealed that 41 percent of language minority students who spoke "English with difficulty," as reported to the U.S. Census Bureau, compared to 12 percent for students overall, dropped out of high school prior to completion of 12th grade. *See* DOEd, *Condition of Education 1994*, table 4.1, p. 176, citing U.S. Department of Commerce, Bureau of Census, Current Population Survey, October 1992.

69 Lynn Schnaiberg, "In Questioning Bilingual Education, Hispanic Parents Join the Backlash," *Education Week*, vol. xv, no. 23 (Feb. 28, 1996), p. 11 (hereafter cited as Schnaiberg, "Questioning Bilingual Education").

70 Ibid., p. 11. Schnaiberg's article notes that parental criticism of bilingual education programs is by no means universal. For instance, the article reports that a group of Laotians in Saginaw, Texas, are unabashedly in favor of these programs. Ibid., p. 11.

71 Ibid., pp. 6–7.

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board, who reported that bilingual education has been unable to teach students English such that they are able to succeed in regular classes along with their more English proficient peers.[73] The board's president stated participants were not succeeding academically, nor were they exiting the program and "graduating" into regular classrooms.[74] Consequently, the Denver School System, as of April 1997, revised its education practices. It now plans to introduce English more quickly, and move students into English-only classes after 3 years of participating in the district's bilingual education program.[75] Under this plan, children with limited English proficiency who could benefit from native language instruction after this period would be tutored on an individualized basis and closely monitored.[76]

On the other side of the debate, in States across the country, are advocates of bilingual education who, unlike the Denver group and others, want native language instruction as a key component of programs for students with limited English proficiency. Many advocates of bilingual education argue vigorously for its effectiveness in providing students with limited English proficiency with the appropriate learning tools to address their educational needs. Representative Jose Serrano (D–NY), has stated:

> It is important to understand that bilingual education is not an ideological issue. It is an educational issue. If you want children to learn, support bilingual education. If you don't want them to learn, oppose bilingual education. It is that simple. . . .[77]

Bilingual education advocates believe bilingualism promotes the goals of a more rigorous academic curriculum and higher levels of academic achievement for U.S. students sought in Federal education policy through the Goals 2000 program and by the States in their own education legislation. Kathy Escamilla, then President of the National Association for Bilingual Education, has stated in testimony before Congress:

> The federal government's investment in bilingual education has dramatically expanded the learning opportunities available to limited English proficient students. The dividends of this investment are reflected in the real-life performance of LEP students in bilingual education programs: higher academic attainment, both in English language arts and the subject-matter content areas; higher rates of school attendance and graduation; and increased levels of parental involvement in the education of their children.[78]

Unlike the English-only movement, bilingual education advocates do not share the belief in a

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72 Ibid., pp. 6–7. OCR, which has recognized some bilingual programs as examples of promising practices for educating students with limited English proficiency, also found that in this particular case Denver Public Schools "failed to properly implement its bilingual program." Janet Bingham, "Feds Assail DPS Bilingual Plan," *The Denver Post*, Aug. 1, 1997, p. 1A.

73 Schnaiberg, "Questioning Bilingual Education," pp. 6–7. Previously, in 1994, the Latino Education Coalition organized a student "walkout" in protest of the school system's treatment of Hispanic students, and demanded an improvement of bilingual education programs. Ibid.

74 Ibid., pp. 6–7. In 1994–1995, fewer than 5 percent of LEP students exited bilingual and ESL language programs and entered the regular education environment. Ibid.

75 Ibid., pp. 6–7. The school board president claims that the motivation for the revision of bilingual education is to foster the district's primary objective of "graduating competent students who are literate in English so that they can succeed." Ibid. However, the 2,900 member Denver Teachers Association is uncertain of the potential outcomes of the revisions to the bilingual education program. Ibid.

76 Schnaiberg, "Denver Hispanics Assail Bilingual Ed. Plan," *Education Week*, vol. 16, issue 31 (Apr. 30, 1997), pp. 6–7. Although the Latino Education Coalition supports changes within the Denver School System's English language acquisition programs, the members want their children to be bilingual, and therefore are not advocating that the school district implement an English-only approach with no native language instruction. Ibid.

77 *See* Statement of Jose Serrano, U.S. Representative, Before the House Committee on Education and Labor, Subcommittee on Elementary, Secondary and Vocational Education, July 22, 1993, p. 3.

78 *See* Statement of Kathy Escamilla, President, National Association for Bilingual Education, Before the House Committee

single goal for instructional programs. Many advocates of bilingual education agree the main goal should be providing the student with English language proficiency. Representative Dale E. Kildee (D–Mich.) has stated:

I want to remind people that the purpose of bilingual education is to help students become proficient in English while using their native language for instruction so that these students do not fall behind academically and so they can achieve grade promotion and high graduation rates.[79]

Some advocates of bilingual education programs believe bilingual education programs also should operate with secondary goals. These advocates of bilingual education believe the goal of bilingualism is equally important to achieving English proficiency. Therefore, bilingualism should serve as one of two primary goals. These bilingual education advocates seek programs that will provide students' proficiency in their native language and foster students' native culture.

All advocates of bilingual education, however, share a belief that effective educational programs for students with limited English proficiency require the use of native language instruction, regardless of the program's goals with respect to native language proficiency. This view has been promoted by Congress in its policy, purpose, and findings in the 1994 reauthorization of the Bilingual Education Act:

[T]he use of a child's native language and culture in classroom instruction can- "(A) promote self-esteem and contribute to academic achievement and learning English by limited English proficient children and youth; (B) benefit English-proficient children and youth who also participate in such programs; and (C) develop our Nation's national language resources, thus promoting our Nation's competitiveness in the global economy;. . .[80]

In particular, advocates of bilingual education emphasize the need for programs including both English and native language instruction by teachers who speak English and the students' native language fluently.[81] They support this view with research studies showing marked academic improvement and higher retention rates for students who have participated in bilingual education programs.[82]

The effectiveness of bilingual programs in educating students with limited English proficiency has been noted by the Office for Civil Rights (OCR). For example, OCR issued a technical assistance document detailing "promising practices" undertaken by school districts around the

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on Education and Labor, Subcommittee on Elementary, Secondary and Vocational Education, July 22, 1993, p. 60.

79 *See* Dale E. Kildee, Chairman, House Committee on Education and Labor, Subcommittee on Elementary, Secondary and Vocational Education, Hearing on Bilingual Education, July 22, 1993, p. 1.

80 *See* 20 U.S.C. § 7402(a)(14)(A)–(C) (1994).

81 *See* Statement of Kathy Escamilla, President, National Association for Bilingual Education, Before the House Committee on Education and Labor, Subcommittee on Elementary, Secondary and Vocational Education, July 22, 1993, pp. 57–72. *See also*, "Language Groups Call All English Dialects Valid," *The Washington Times*, Tuesday, Mar. 12, 1996, p. A3. (reporting on voluntary national standards released jointly by the National Council of Teachers of English and the International Reading Association. According to the article, Standard 10 states: "Students whose first language is not English make use of their first language to develop competency in the English language arts and to develop understanding of content across the curriculum." The executive director of the National Council of Teachers of English, Miles Myers is quoted as saying: "Bilingualism is addressed as multiculturalism. . . We want to approach diversity as a resource. The stress is on English, and bilingualism is a bridge to English.").

82 *See* ibid.

country in providing educational programs to students with limited English proficiency.[83] OCR refers to these programs as "some promising practices and programs implemented by several school districts that may be helpful to other districts in providing equal educational opportunity to LEP students."[84] Of seven programs identified by OCR in this document, six rely on some form of bilingual education.[85] In addition, the discussion of each of the six bilingual programs identified by OCR as "promising practices" presents methods for undertaking efforts to minimize or prevent the segregation of limited English proficient students that critics of bilingual education often note as one of its drawbacks.[86]

In response to the argument that bilingual programs promote segregation, advocates of bilingual education contend that the effects of bilingual education programs can be limited. For example, they emphasize that the goal of bilingualism for all students facilitates the integration of students having limited English proficiency and their English-proficient peers. If programs are designed to achieve bilingualism for all students who participate, students can develop language skills, in part, by relying on each other. In addition, if bilingual programs are effective in achieving bilingualism for all students, American students will be more prepared to communicate and compete at an international level.

Finally, advocates of bilingual education note that a heavy focus on English language acquisition early in a child's academic career may limit the child's academic growth in other content areas such as math and science. For example, a child who has high math ability but little English proficiency may not gain the proper exposure to math concepts because he/she is being taught in a foreign language. Therefore, according to bilingual education advocates, the effects of "English saturation" may be damaging to a child's overall intellectual development.

In setting forth the positions of various viewpoints on approaches to developing and implementing educational programs for students with limited English proficiency, the U.S. Commission on Civil Rights is not attempting to assess and evaluate the educational benefits of these programs. Rather, the Commission seeks only to identify the presence of the debate and its implications for school administrators and officials, teachers, parents, and civil rights compliance officers, most importantly, parents and students themselves.

Contemporary Issues: The Ebonics Debate

Although the "Ebonics" debate is not a focus of this report, the issue has been addressed prominently in the national media. Because some see this issue as related to the civil rights issue facing national origin minority students with limited English proficiency, it merits a brief background discussion.

Ebonics Defined

Terms such as "Black dialect," "Black English," "Black English Vernacular," and "Black lan-

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83 Office for Civil Rights, U.S. Department of Education, *Promising Practices and Programs for Serving National Origin Limited English Proficient (LEP) Students*, prepared by *Lau* Team, Mar. 15, 1996, submitted as part of DOEd/OCR/Philadelphia response to USCCR June 6, 1996 letter (hereafter cited as OCR, *Promising Practices*).

84 Ibid., p. 1.

85 Four of the programs identified by OCR rely on the transitional approach to bilingual education, with programs offering bilingual instruction from 3 to 4 years; two of the programs rely on the two-way bilingual immersion or developmental approach.

86 For example, the two-way bilingual programs identified by OCR operate in classrooms fully integrated between students with limited English proficiency and their English-proficient peers. Each of the four other transitional bilingual programs identified by OCR expressly indicate an emphasis on integration of students with limited English proficiency both in terms of the bilingual education program's curricula (as compared to that of the school's regular education program curricula) and with respect to the level of interaction between students in the bilingual programs and their English-proficient peers. *See* ibid.

guage," as well as "Ebonics" have been used interchangeably to describe the oral communication patterns of African Americans in this country. The term "Ebonics," however, has gained special prominence. According to his testimony before a congressional hearing, Dr. Robert L. Williams, a professor of psychology at Washington University in St. Louis and one of the originators of "Ebonics," coined the term at a January 1973 conference.[87] Dr. Williams indicated the vocabulary, structure, and form of Ebonics separate it from other languages.[88] He combined the words "ebony" and "phonics" to create a term he defined in the following way: "Ebonics may be defined as the linguistic and paralinguistic features which on a concentric continuum represent the communicative competence of the West African, Caribbean, and United States slave descendent of African origin. It includes grammar, various idioms, patois, argots, ideolects, and social dialects of Black people."[89]

The Martin Luther King Junior Elementary School Children Case

Since the early 1970s, educators and other commentators have debated the legitimacy of Ebonics as a language and as a teaching tool. A crucial event in the history of the Ebonics debate as a public school issue occurred in 1979 with a Federal district court ruling in the case of *Martin Luther King Junior Elementary School Children v. The Michigan Board of Education*.[90] The case began in 1977 and involved 15 African American preschool or elementary school children, all residents of a single housing project, who were attending or were eligible to attend Martin Luther King Junior Elementary School.[91] The mothers of the children alleged initially that the school, in determining eligibility of all students for special education services, failed to determine whether the children's learning difficulties "stemmed from cultural, social, or economic deprivation."[92] However, the plaintiffs were ordered to amend their complaint to eliminate any references to the cultural and economic barriers faced by the students.[93]

In 1979 the Federal district court ruled that the defendant school board must take appropriate action, as required by the Equal Educational Opportunities Act of 1974, to overcome the language barrier faced by the children at the elementary school.[94] The court identified the children's lan-

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87 *See* Robert L. Williams, Statement before the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997, p. 1 (hereafter cited as Williams Statement).

88 *See* Williams Statement, p. 1.

89 Williams Statement, p. 1; *see also* Dr. Robert L. Williams, *The True Language of Black Folks* (1975).

90 473 F. Supp. 1371 (E.D. Mich. 1979).

91 473 F. Supp. at 1373.

92 473 F. Supp. at 1373.

93 Martin Luther King, Jr. Elem. Sch. Children v. Michigan Bd. of Educ., 463 F. Supp. 1027, 1030 (E.D. Mich. 1978). The court limited the plaintiffs' claims in two rulings on the defendants' motions to dismiss. First, the court dismissed the plaintiffs' claims under the 14th amendment, Title VI, the Michigan Constitution, and Michigan common law; preserving only the plaintiff's claim under the EEOA. Martin Luther King, Jr. Elem. Sch. Children v. Michigan Bd. of Educ., 451 F. Supp. 1324, 1335 (E.D. Mich. 1978).
In addition to ordering the elimination of references to cultural or economic barriers, the court stated that, to pursue a claim under section 1703(f) of the EEOA, the amended complaint must: (1) identify the students' language barriers; (2) allege how the language barriers impede their equal participation in the school's instructional programs; (3) identify the appropriate action the defendants failed to take, and match the specific actions to specific defendants; and 4) identify the connection between the defendants' failure to take appropriate action and a denial of equal educational opportunity on account of race. 463 F. Supp. at 1030–31.

94 473 F. Supp. at 1383.

guage barrier as follows: "A language barrier develops when teachers, in helping the child to switch from the home ("black English") language to standard English, refuse to admit the existence of a language that is the acceptable way of talking in his local community."[95] However, the court emphasized the language difference between "black English" and standard English is not a language barrier in and of itself.[96] Thus, the children's language is not a barrier, but it becomes a barrier when teachers do not take it into account in teaching standard English.[97] Moreover, the court found that by failing to develop a program to assist teachers in understanding the students' language, the school district did not take appropriate action to overcome the language barriers. The court stated this failure to take appropriate action had an impact on race in violation of the EEOA.[98]

To overcome the children's language barrier, the court ordered the school board to devise an action plan designed specifically to help the teachers at the elementary school to: (1) identify children who speak "black English" in their home community, (2) recognize the existence of the language system used in the home community, and (3) use the knowledge of the home or community language in teaching the students to read standard English.[99] The court stressed that its role is not to "tell educators how to educate," but only to ensure that the school board fulfills its legal obligation to take appropriate action to overcome the language barriers.[100]

The court's decision focuses primarily on reading instruction. In describing the issues of the case, the court stated, ". . . the evidence has largely been directed at learning to read, the most basic of all instructional programs of the school."[101] In describing the importance of communicating in the standard language of society, the court stated:

> The art of communication among the people of the country in all aspects of people's lives is a basic building block in the development of each individual. Children need to learn to speak and understand and to read and write the language used by society to carry on its business, to develop its science, arts, and culture, and to carry on its professions and governmental functions. Therefore, a major goal of a school is to teach reading, writing, speaking, and understanding standard English.

However, the order neither explicitly prohibits nor explicitly permits the incorporation of the children's language into the teaching of other subjects.

Thirty days after the court issued its order, the school district submitted a plan for the court's review. The plan was devised only for the Martin Luther King Junior Elementary School, and focused primarily on providing instruction in reading standard English. The plan's objectives included: (1) helping staff to appreciate and understand black English; (2) training staff to identify children who speak black English; (3) assisting staff to respond to the needs of children who speak black English when providing reading instruction in standard English; (4) establishing a consultation externally to remain current on the latest information on black English and its role in learn-

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95 473 F. Supp. at 1382.

96 473 F. Supp. at 1383.

97 473 F. Supp. at 1382.

98 473 F. Supp. at 1382.

99 *See* 473 F. Supp. at 1383. The court required the school board to devise a plan that included specifically the teachers and students of the Martin Luther King Junior Elementary School, but allowed the school board to submit a broader plan for the court's consideration. The court stated specifically that this broader plan may include other elementary schools, but did not mention whether or not this plan also could include secondary schools.

100 473 F. Supp. at 1383.

101 473 F. Supp. at 1374.

ing to read standard English; and (5) helping staff to communicate to parents the continuing need for parental input and support.[102] The plan provided specific details on formal inservice training for the staff, the application of the training in the classrooms, the management of the plan, a method for evaluating the plan, and a budget to pay for its cost.[103]

In reviewing the legal sufficiency of the plan, the court stated explicitly it would not make judgments on what constitutes sound educational policy.[104] With few exceptions, the court found the school district's plan reasonable and rational and in compliance with the EEOA.[105] Because the children are the ultimate beneficiaries of the plan, the court suggested that the board modify the plan to broaden the evaluation mechanism. The court emphasized that the evaluation of the plan should determine not only if the barriers are overcome, but also if the plan succeeded in eliminating the impediments to equal participation in the instructional programs. This could be accomplished by evaluating the students' progress in attaining reading skills.[106]

Although the court's order in *Martin Luther King Junior Elementary School Children* is controlling only in one jurisdiction, other school districts have adopted similar plans. These plans address the problems of "linguistic minorities" by emphasizing instructional programs and teacher training in eliminating language barriers.[107]

The Current Debate

Federal and State governments have not taken steps to address the problems faced by nonlanguage minority students who are not proficient in standard English.[108] Federal funding for language programs does not extend to African American children whose home or community language is not standard English.[109] However, the debate over Ebonics remains unresolved, and recent actions by the Oakland, California, school board have recently rekindled the controversy. On December 18, 1996, the Oakland, California, Unified School District's Board of Education approved a

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102 473 F. Supp. at 1385.

103 *See* 473 F. Supp. at 1385, n.1.

104 473 F. Supp. at 1385.

105 473 F. Supp. at 1390–91.

106 473 F. Supp. at 1390.

107 Two such districts are the DeKalb County, GA, school district and the Los Angeles Unified School District. *See* Doug Cumming, "For the Students who Speak One Way at Home and Another at School, DeKalb Has a Unique Technique: A Different Approach to Teaching Language," *The Atlanta Constitution*, Jan. 9, 1997, p. 01B; Lyn Schnaiberg, "Talking the Talk: Can Lessons in Standard English Usage Help Boost Black Student Achievement?" *Education Weekly*, June 1, 1994, pp. 26–29.

108 *See* John Baugh, "The Law, Linguistics, and Education: Educational Reform for African American Language Minority Students," *Linguistics and Education*, vol. 7 (1995), p. 88.

109 However, in its 1980 proposed rules, the U.S. Department of Education's Office for Civil Rights defined "limited English proficient" as referring to: "students with a primary language other than English who have such difficulty with the English language that the opportunity to participate effectively in school may be denied when English is the exclusive language of instruction." 45 Fed. Reg. 52,052 (1980).
The Bilingual Education Act adopts the consensus that students who have limited English proficiency are those who, by some measure, have insufficient English language capabilities to succeed in an all-English classroom environment. *See* 20 U.S.C. §§ 7401–7602 (1994); *see also* U.S. Department of Education, *The Condition of Bilingual Education in the Nation: A Report to the Congress and the President* (1991); G. De George, "Assessment and Placement of Language Minority Students: Procedures for Mainstreaming," *Equity and Excellence*, vol. 23, no. 4 (April 1993), pp. 44–56; John Baugh, "The Law, Linguistics, and Education: Educational Reform for African American Language Minority Students," *Linguistics and Education*, vol. 7 (1995), p. 92 (hereafter cited as Baugh, "The Law, Linguistics, and Education").

policy affirming standard American English language development for all students.[110] The policy mandated "that effective instructional strategies be utilized to ensure that every child has the opportunity to achieve English language proficiency and academic success."[111] Under the policy, the board's task force sought strategies that would enhance the opportunity for all of its students to participate in and successfully master the core curriculum.[112] Thus, the Oakland school board accepted the recommendation that since there is a connection between English language proficiency and student achievement, the "unique" language of many African American students, usually referred to as Ebonics, should be recognized, used and understood within the school system as individual educational needs that should be addressed by school personnel.[113]

As the debate in the Oakland school district gained widespread publicity and became a topic of national concern, Congress called for a hearing on the issues surrounding its use in education. On January 23, 1997, the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services, and Education, conducted a hearing on Ebonics to present the differing views on the issue.[114] At the hearing, both opponents and supporters of Ebonics offered testimony and answered questions for the subcommittee. Carolyn Getridge, Superintendent of the Oakland Unified School District, stated:

> The recent actions by the Oakland Unified School District have sparked a national debate concerning the failure of our public schools to effectively serve the educational needs of African American and other minority students. The . . . focus on 'ebonics' diverts our attention. . . . The central issue is the underachievement of African American and other minority children, and what are we doing to address this dismal record.[115]

The current debate arising from the actions of the Oakland school district in developing and implementing an Ebonics program has several implications for educational programs. First, the debate calls into question the meaning of the term "limited English proficiency" as it has been defined in Federal laws and policies such as the Bilingual Education Act. The debate also raises the issue of whether schools should create special programs to address the lack of standard English proficiency among students whose lack of English proficiency is not related to the presence of a different native language as we have traditionally viewed that term and as the Bilingual Education Act defines it. The debate also raises the issue of whether Ebonics itself may be considered a language or, at a minimum, a legitimate teaching tool in assisting teachers in their work with students who do not possess standard English proficiency, and, in turn, the students themselves, who need to acquire standard English proficiency.

Achieving standard English proficiency has been an obstacle for many African American children in the public school system. Educators have linked standard English proficiency with achievement on standardized and classroom tests; entrance to gifted and talented programs; and overall academic success in school.[116] There seems

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110 *See* Statement of Carolyn M. Getridge, Superintendent, Oakland Unified School District, before the U.S. Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997, p. 1 (hereafter cited as Getridge Statement).

111 Getridge Statement, p. 1.

112 Getridge Statement, p. 1. In 1995, there were 52,269 students enrolled in the school district, 52 percent of the students are African Americans, only 37 percent of the students enrolled in gifted and talented classes are African Americans, and 71 percent of the students enrolled in special education are African Americans. The achievement test scores for African American students are the lowest in a district with a diverse student population. Getridge Statement, pp. 4–5.

113 Getridge Statement, pp. 1–2.

114 *See* Sen. Arlen Spector, Chairman, U.S. Senate Appropriations Subcommittee on Labor, Health and Human Services and Education Appropriations, Statement on the Subcommittee's *Hearing on Ebonics*, Jan. 22, 1997.

115 Getridge Statement, p. i.

little doubt that standard English proficiency is a requirement for attaining equal access, equality of educational opportunity, and effective participation in the regular educational program.

As a result, educators have recognized the need to increase the scores of African American students in the study of English, and in the development of strong standard English reading and writing skills.

According to University of Pennsylvania linguistics professor William Labov, who testified on Ebonics before the U.S. Senate Subcommittee on Labor, Health and Human Services and Education Appropriations, the Ebonics debate centers on two competing instructional methodologies used to address these needs.[117] One methodology, which may be viewed as "traditional," operates to reinforce the correct spoken and written forms of English in the classroom through rote and repetition.[118] This method seeks to immerse the student in the correct forms and usage of English so there is no confusion as to which forms are correct. In this respect, it is much like the approach used in the teaching of a foreign language class. This method has been used in public school systems nationwide for many years.

The second instructional methodology described by Professor Labov often has been referred to as the "home" language approach.[119] Educators who employ this method believe a child learns faster in the language with which he or she is most comfortable speaking. This method allegedly helps to bridge the gap between "home" language and standard English by allowing children to better and more quickly develop their reading and writing skills in standard English.[120] Both methods have received support for their attributes and criticism for their shortcomings.

Policymakers, educators, and educational researchers have been among those who have stated they believe the Oakland School Board made a sound judgment in incorporating Ebonics into its public school system.[121] Many of those who support Ebonics programs believe "Black

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116 *See e.g.*, Harry N. Seymour and Charlena M. Seymour, "Ebonics and Public Law 94–142," *Journal of Black Studies*, vol. 9, no. 4 (June 1979), p. 452 (noting that assessment and evaluation procedures for African American children should properly consider background and linguistic differences to ensure that African American children have access to educational opportunities granted by law; and stating that "[E]bonics is the most important cultural difference affecting school performance among Black children," Ibid., p. 454); Harry N. Seymour and Charlena M. Seymour, "The Symbolism of Ebonics: I'd Rather Switch than Fight," *Journal of Black Studies*, vol. 9, no. 4 (June 1979), pp. 404–05. The two researchers state that: "[t]he attitudes of teachers about Ebonics and the misdiagnosis of Black children as handicapped and/or retarded have been identified as two immensely important areas relative to the quality of education of the Black child;" *see also* Alice M. Scales and Bernice G. Brown, "Phonics: An English Language Pattern," *The Negro Educational Review*, vol. 23, no. 3–4 (July-October 1981), pp. 254–55.

117 *See* Statement of William Labov, Professor of Linguistics, University of Pennsylvania, before the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997, p. 3 (hereafter cited as Labov Statement).

118 Labov Statement, p. 3.

119 Labov Statement, p. 3.

120 Labov Statement, p. 3.

121 *See e.g.*, Barbara Lee, Member of the California State Senate, "Helping Students to Achieve," Statement to the Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, Jan. 23, 1997, p. 2 (Stating that: "[a]t a conference in Chicago, Illinois this month, the Linguistic Society of America, whose present membership of approximately 7000 persons and institutions includes leading experts on language, released their own resolution regarding the issue. In short, they concluded 'that the Oakland School Board's decision to recognize the vernacular of African American students in teaching them Standard English is linguistically and pedagogically sound.'"); *see also* John R. Rickford, Professor, Department of Linguistics, Stanford University, letter to Sen. Arlen Spector, Chairman, U.S. Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services and Education Appropriations, Jan. 21, 1997; Statement of Maxine Waters, Representative in Congress, before the Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997.

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English" is a legitimate language, and that it can and should be part of the regular classroom curriculum used for teaching children standard English.[122] They support this idea based on the premise that children will learn more effectively if they are taught using their "home" language, and that Ebonics can be a constructive method or tool in teaching standard English to African American children.[123] They also cite the need for teacher knowledge of and sensitivity toward children who speak "Black English."[124]

Ebonics supporters point to programs that have been successful in other school districts around the country.[125] For example, for the past 10 years Dekalb County, Georgia, has been conducting a very successful program teaching students to switch from their "home" language to their "school" language.[126] In this approach, "home" language is respected, but it is not encouraged as the proper way to speak in the classroom. Kelli Harris-Wright designer and director of the program calls it "bidialectal" because they are trying to teach the children that different settings and contexts may require the use of different language patterns depending on the specific settings or context.[127] In 1996, about 600 fifth and sixth grade students were enrolled in the course.[128]

However, many policymakers, education experts and media commentators on Ebonics have stated Ebonics is not enough to help raise the standards of all children in the public school system.[129] Critics of using Ebonics in the public school system believe that educational programs should remain focused on the teaching and learning of standard English.[130] Critics of Ebonics be-

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122 *See* Mumia Abu-Jamal, "Mumia Abu-Jamal On. . . Mother Tongue: Black English Revisited," The Washington *Afro-American*, Feb. 8, 1997, Editorial Page; Ernie A. Smith, "Ernie E. Smith On. . . Ebonics: Scholarship v. Hysteria," *The Washington Afro-American*, Feb. 1, 1997, Editorial Page; Statement of Rev. Amos C. Brown, Chair, Civil Rights Commission, National Baptist Convention USA, Inc., before the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997; Statement of Rep. Maxine Waters, before the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997; Mary Rhodes Hoover, "A Vindicationist Perspective on the Role of Ebonics (Black Language) and Other Aspects of Ethnic Studies in the University," *American Behavioral Scientist*, vol. 34, no. 2 (November/December 1990), pp. 251–62; Jean Wofford, "Ebonics: A Legitimate System of Oral Communication," *Journal of Black Studies*, vol. 9, no. 4 (June, 1979), pp. 367–82; Brenda Smith, "It Ain't What You Say, It's the Way You Say It: Exercises for Teaching Mainstream American English to Ebonics-Speaking Children," *Journal of Black Studies*, vol. 9, no. 4 (June 1979), pp. 489–93.

123 *See* Randy Moss, "Beyond Ebonics: Why 'Black English' Matters," *Education Week*, Jan. 29, 1997, p. 4B.

124 *See* John Legland and Nadine Joseph, "Hooked on Ebonics," *Newsweek*, Jan. 13, 1997, pp. 78–79.

125 *See* Rene Sanchez, "Ebonics: A Way to Close the Learning Gap?," *The Washington Post*, Jan. 6, 1997, p. A1.

126 Doug Cumming, "A Different Approach to Teaching Language," *The Atlanta Constitution*, Jan. 9, 1997, p. 1B.

127 Doug Cumming, "A Different Approach to Teaching Language," *The Atlanta Constitution*, Jan. 9, 1997.

128 Wright points out that other programs like this one would be eligible for Title I funds but not bilingual education aid, as Oakland first sought.

129 *See* Armstrong Williams, "Armstrong Williams Says. . . Ebonics Is a Crutch," *The Washington Afro-American*, Feb. 8, 1997, Editorial Page; Randel Shard, "Randel Shard On. . . Hooked on Ebonics, Feb. 1, 1997, Editorial Page; Statement of Jim Boulet, Jr., Executive Director, English First, before the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997; Ellis Cose, "Why Ebonics is Irrelevant," *Newsweek*, Jan. 13, 1997, p. 80; Peter T. King, Member of Congress, "When Is a Language Not a Language? When It's Ebonics!," Jan. 13, 1997.

130 *See* Statement of Dr. Orlando Taylor, Dean, Howard University Graduate School of Arts and Sciences, before the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997, pp. 2–3 (hereafter cited as Taylor Statement); Statement of Jim Boulet, Jr., Executive Director, English First, before the U.S. Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services and Education Appropriations, *Hearing on Ebonics*, Jan. 23, 1997 (hereafter cited as Boulet Statement); *see also* Carol Innerst,

lieve that Ebonics reinforces the teaching of "bilingual education," which they believe hinders rather than enhances students' achievement in schools.[131] They question the Oakland proposal's viability in improving African American students' learning of standard English.

The opposing sides in the Ebonics debate agree that the reading and writing achievement levels for African American students remain significantly lower than those of their white counterparts, and that many African American children have not acquired sufficient proficiency in standard English to facilitate their educational achievement and success after graduation.[132] To address these concerns, the two sides agree that there should be instructional programs to address the language barriers all students encounter when equal educational opportunity is denied.[133]

"Scholar disputes Ebonics link to African Dialects," *The Washington Times*, Jan. 15, 1997, p. A2.

131 *See* Boulet Statement, pp. 1–2. English First is an organization that endorses, as one of its goals, an educational system that promotes standard English as the primary and only language that should be taught to children in school. It has approximately 140,000 members.

132 *See* Taylor Statement, p. 1; Boulet Statement, p. 1.

133 *See generally* Taylor Statement, pp. 1–9.

Chapter 4

The U.S. Department of Education's Office for Civil Rights

Administrative Responsibility for Civil Rights Enforcement

The Office for Civil Rights

The primary office at the U.S. Department of Education responsible for enforcing the civil rights statutes is the Office for Civil Rights (OCR). OCR enforces Title VI of the Civil Rights Act of 1964,[1] Title IX of the Education Amendments of 1972,[2] and section 504 of the Rehabilitation Act of 1973.[3] OCR's civil rights implementation and enforcement activities include civil rights policy development and dissemination; investigation of complaints alleging discrimination by recipients of the Department of Education's financial assistance; and initiation of enforcement actions against recipients who refuse to comply with civil rights requirements willingly. In addition, OCR undertakes proactive activities to promote civil rights compliance and uncover and remedy instances of noncompliance. Such proactive activities include: conducting outreach and education to inform applicants, recipients, participants, and beneficiaries of Department of Education-funded programs of civil rights requirements; providing technical assistance to recipients to help them comply with civil rights requirements; and conducting compliance reviews of recipients to uncover and remedy violations of civil rights laws.[4]

Office of General Counsel

The General Counsel serves as the principal advisor to the Secretary on all legal matters affecting the U.S. Department of Education's (DOEd's) programs and activities.[5] With respect

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1 42 U.S.C. §§ 2000d to 2000d–7 (1994).

2 20 U.S.C. §§ 1681–1688 (1994).

3 29 U.S.C. § 794 (1994). In addition to these statutes, OCR also enforces the Age Discrimination Act of 1975 and the Americans with Disabilities Act of 1990, and OCR helps implement civil rights provisions in Title V, Part A, of the Elementary and Secondary Education Act. *See* Office for Civil Rights, U.S. Department of Education, "Fiscal Year 1996 Budget Request," p. Z–9 (hereafter cited as OCR FY 1996 Budget Request).

4 *See* U.S. Commission on Civil Rights, *Title VI Enforcement in Federally Assisted Programs to Ensure Nondiscrimination*, June 1996, chap. 5 (hereafter cited as U.S. Commission on Civil Rights, *Title VI Enforcement in Federally Assisted Programs to Ensure Nondiscrimination*).

5 U.S. Department of Education, Administrative Communications Systems, *Mission and Organizational Manual*, Office of the General Counsel, vol. I, part B (1992), p. 1 (hereafter cited as *1992 Mission Manual OGC*). OGC's mission includes the following:

- Provides legal advice and services to the Secretary, Deputy Secretary, Principal Officers of the Department of Education, or any other person authorized to request such advice or services.
- Prepares and reviews public documents, rules, regulations issued by DOEd, and legal instruments entered into by the Department;
- Represents the Secretary, DOEd, or any of its officers or units in court or administrative litigation, except for administrative proceedings initiated by the Office for Civil Rights;
- Serves as liaison to other Federal agencies in connection with legal matters involving DOEd;
- Drafts legislation proposals originating in the Department and reviews the legal aspects of proposed or pending legislation; and

to civil rights, OGC reviews all civil rights regulations and policies developed by OCR before they are submitted to the Secretary of Education for approval and advises the Secretary as to their legal sufficiency. OGC brings together both program assistance and enforcement issues in the areas of race, national origin, age, gender, and disability.[6] Based on OGC's role as legal advisor to the Secretary, the General Counsel aims to ensure that OCR and the Office of Special Education and Rehabilitative Services, Office of Elementary and Secondary Education, and Office of Bilingual Education and Minority Language Affairs have consistent approaches to issues where there are overlapping areas of responsibility.[7]

With respect to civil rights enforcement, OGC is neither the legal arm of OCR nor a party to any administrative proceedings initiated by OCR. However, the General Counsel is responsible for all Federal court litigation involving the department, including civil rights litigation. As a practical matter, the General Counsel often relies on OCR to perform much of the work relating to civil rights litigation, subject to the General Counsel's review.[8] A 1980 memorandum details the responsibilities of OGC and OCR with respect to three types of litigation activity: referral of cases to the Department of Justice, *amicus curiae* briefs, and defensive litigation. Civil rights cases are referred to the U.S. Department of Justice for litigation, and the Secretary recommends that the Department of Justice file an *amicus curiae* brief upon the advice of the Assistant Secretary for Civil Rights, after review by the General Counsel. In civil rights cases filed against DOEd, the General Counsel is responsible for coordinating the Department of Education's defense with the Department of Justice, and uses OCR's expertise and staff resources. Although OGC has primary responsibility for all litigation matters, for most litigation, OCR attorneys interact directly with the Department of Justice.[9]

In a recent interview, Judith Winston, the Department of Education's General Counsel and a civil rights attorney, described her role as follows: "As general counsel, I have the sole responsibility for referring cases" from the Department of Education to the Department of Justice, "so all of the legal work [on civil rights court litigation] that flows out of the department first flows through my office."[10]

The Office of Bilingual Education and Minority Languages Affairs

The Office of Bilingual Education and Minority Languages Affairs (OBEMLA) was created in 1974 to assist school districts[11] meeting their obligation to provide equal educational opportunity

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• Prepares or reviews briefs, memoranda, and other legal documents for proceedings involving the Department or requested by other government agencies for use in proceedings except for administrative proceedings initiated by the Office for Civil Rights. *1992 Mission Manual OGC*, p. 1.

6 General Counsel, Office of General Counsel, U.S. Department of Education, information memorandum to DOEd Secretary, June 10, 1980, "Civil Rights Enforcement Between the General Counsel and Assistant Secretary for Civil Rights," p. 1 (hereafter cited as OGC/OCR Information Memorandum). In addition to the Immediate Office of the General Counsel, OGC has three major components: Program Service, Postsecondary and Departmental Service, and the Regulations and Legislation Service. The Office of the General Counsel also has an Operations Management Staff located in the Immediate Office of the General Counsel, which reports directly to the General Counsel. The Operations Management Staff is responsible for financial management and administrative services within OGC. *See 1992 Mission Manual OGC*, p. 2.

7 OGC/OCR Information Memorandum, p. 2.

8 *See* OGC/OCR Information Memorandum, pp. 2–3.

9 Ibid., pp. 3–4.

10 Judith Winston, General Counsel, U.S. Department of Education, as cited in "Winston's Civil Rights Focus Stems From Her Work in the 60s," *Education Daily Special Supplement*, July 2, 1996, pp. 4–6.

11 Altogether, OBEMLA programs (based on 1993 data) reached K–12 students in 42 percent of the Nation's 15,000 school districts. *See* the U.S. Department of Education, *1993–1994 Biennial Report*, p. 201–2.

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for students with limited English proficiency. OBEMLA's mission is to "provide national leadership in promoting equal access to high quality education to linguistically and culturally diverse students."[12] To pursue this mission, OBEMLA aims to increase and promote improvements in State and local educational agency services, as well as curricular materials for linguistic minority students; and to strengthen the capabilities of higher education institutions and related agencies that provide bilingual education training courses. It also strives to provide financial assistance to students who are preparing to become bilingual education teachers.[13] To fulfill this mission, OBEMLA administers grants and provides technical assistance to local educational agencies for special programs that enable students with limited English proficiency to benefit fully from their educational opportunities.[14] OBEMLA's role in preserving equal educational opportunity has evolved from congressional policy and judicial decisions.

OBEMLA's role in civil rights enforcement is limited. Formally, it has no responsibilities for civil rights enforcement. Based on the U.S. Department of Education's organization and division of functions, OCR is the sole office within the U.S. Department of Education with civil rights enforcement responsibilities. Consequently, OBEMLA's role in civil rights is limited to ensuring that grant applicants have submitted a signed form assuring that they do not discriminate.[15] It also consists of reviewing and providing comment on OCR's draft regulations and policies as they may relate to OBEMLA programmatic functions. OBEMLA does not conduct independent investigations of civil rights issues, nor does it provide technical assistance to grantees on civil rights compliance. Rather, OBEMLA refers information on noncompliance and requests for technical assistance to OCR.[16]

OCR's Interaction with the Program Offices

Although OCR is the sole office within the U.S. Department of Education with civil rights enforcement responsibilities, there is some interaction between OCR and the program offices such as OBEMLA to assist OCR in its work. This interaction stems from program offices providing information or referrals to OCR. For example, when each applicant for financial assistance under a Department of Education program completes its application package, it must sign an assurance that it will comply with civil rights laws. If the program office, in reviewing an application, receives information that an applicant or grantee may not be in compliance with civil rights requirements, the program office provides OCR with this information on which OCR can then conduct followup activities. If an applicant or grantee requests from the program office information or technical assistance on civil rights issues, the program office will refer that applicant/grantee to

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12 U.S. Department of Education, Office of Bilingual Education and Minority Languages Affairs, "Office of Bilingual Education and Minority Languages Affairs: Reorganization Proposal," p. 1, Eugene E. Garcia, Director, Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, memorandum to Keith Berger, Director, Strategy and Management Consulting Group, Office of Management, U.S. Department of Education, re: Request for Organizational Approval of the Office of Bilingual Education and Minority Languages Affairs (undated).

13 *1992 Mission Manual OBEMLA/IO*, p. 1.

14 To support its technical assistance function, OBEMLA provides funding to support a National Clearinghouse on Bilingual Education. In addition to its service delivery role, OBEMLA funds are used for research endeavors to determine effective instructional approaches for enabling students with limited English proficiency to utilize their native language, while achieving competence in English; and that aim to develop alternative instructional programs and material resources. *See 1992 Mission Manual OBEMLA/IO*, p. 1.

15 U.S. Department of Education, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1.

16 U.S. Department of Education, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1.

OCR.[17] As the program office's civil rights function is limited to this review of the assurance form, OCR's role in the grant review process also is limited. OCR reviews regulations proposed by program offices, including selection criteria, for civil rights concerns. The Department of Education's general administrative regulations, which are used by many discretionary grant programs, consider how the applicant will ensure that eligible project participants are selected without regard to race, color, national origin, gender, age, or disability.[18] However, OCR does not participate with the program offices in establishing specific criteria used to award Federal funds or in ensuring that equal educational opportunity principles are incorporated into these criteria.[19]

The interaction between OCR and the program offices also entails review of OCR draft regulations and policy documents to ensure that programmatic concerns are fully considered in the development of civil rights regulations and policy guidance. When OCR develops regulations or policy guidance, it provides these documents to the appropriate program offices for review before final issuance. Other than these two areas of interaction, OCR has little formal communication with the program offices except when their statutory duties coincide. For example, OCR has contact with the Office of Elementary and Secondary Education relating to magnet school assistance programs.[20] OCR, however, maintains an active relationship with the Office of Special Education and Rehabilitative Services and has a memorandum of understanding with that office, which it follows closely.[21] OCR does not have a formal memorandum of understanding with OBEMLA or the other program offices.[22] On an informal basis, OCR staff members occasionally work with the Office of Educational Research and Improvement's regional laboratories when negotiating resolutions or developing technical assistance materials.[23]

Title VI and the Equal Educational Opportunities Act

Federal civil rights protection for students with limited English proficiency principally derives from two statutes, Title VI of the Civil Rights Act of 1964[24] and section 1703(f) of the Equal Educational Opportunities Act of 1974.[25] Legal stan-

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17 U.S. Department of Education, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1.

18 34 C.F.R. § 75.210(b)(3)(v) (1996).

19 U.S. Department of Education, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1.

20 U.S. Department of Education, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1.

21 Jean Peelen, Enforcement Director, D.C. Metro Office, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 2 (issue contact person for minority students in special education) (hereafter cited as Peelen interview).

22 U.S. Department of Education, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996 (The Commission requested that the Office for Elementary and Secondary Education, OBEMLA, the Office of Special Education and Rehabilitative Services, and the Office of Educational Research and Improvement provide copies of their memoranda of understanding with OCR. Only the Office of Special Education and Rehabilitative Services provided a memorandum of understanding.).

23 *See* Susan Bowers, Senior Enforcement Director, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, May 28, 1996, pp. 9–10 (former issue contact person on testing issues) (hereafter cited as Bowers interview).

24 42 U.S.C. § 2000d (1994).

25 Section 1703(f) of the Equal Educational Opportunity Act of 1974 provides that: "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by– (f) the failure by an educational

dards set forth by the Federal courts, such as the Supreme Court's 1974 ruling in *Lau v. Nichols*,[26] and the U.S. Department of Educatio..'s[27] Office for Civil Rights' regulations and policies in the 30 years since the passage of Title VI complete the Federal framework of civil rights protections designed to establish equal educational opportunity for students with limited English proficiency.

Title VI

Title VI of the Civil Rights Act of 1964 is the legal foundation of OCR's mandate for conducting civil rights enforcement activities.[28] Title VI requires that:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.[29]

In implementing this provision, OCR advanced the Title VI regulations.[30] OCR also promulgated several policy memoranda that dealt directly with civil rights for national origin minority students with limited English proficiency, including the May 1970 guidelines,[31] the December 1985 memorandum,[32] and the September 1991 policy update.[33] Together, these memoranda form the nucleus of OCR's compliance, implementation, and enforcement policy aimed at protecting students with limited English proficiency from discrimination.

The primary judicial interpretation of Title VI as it relates to students with limited English proficiency came in the 1974 case, *Lau v. Nichols*.[34] The *Lau* court recognized the need for special programs to meet special needs, because providing students with the same facilities, texts, teachers, and curriculum does not guarantee equal educational opportunity.[35] Moreover, in reliance on OCR's May 1970 guidelines, the Court noted that a showing of intentional discrimination or "invidious official motivation" was not required to establish a Title VI violation.[36] In a concurring opinion, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, noted that the plaintiffs did not contend that the school administrators had intentionally contributed to the students' language deficiency. The plaintiffs had alleged only that the school administrators had

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agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f) (1994).

26 414 U.S. 563 (1974).

27 The U.S. Department of Health, Education, and Welfare was the Department of Education's predecessor.

28 42 U.S.C. § 2000d (1994).

29 42 U.S.C. § 2000d–1 (1994).

30 34 C.F.R. Part 100 (1996).

31 U.S. Department of Health, Education, and Welfare, "Identification on Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11,595 (1970) (hereafter cited as May 1970 guidelines).

32 U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," Dec. 3, 1985 (hereafter cited as December 1985 memorandum).

33 Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991 (hereafter cited as September 1991 policy memorandum).

34 414 U.S. 563 (1974).

35 414 U.S. at 566.

36 414 U.S. at 568.

failed to react to changing social and linguistic patterns in the school district.[37]

Equal Educational Opportunities Act

The Equal Educational Opportunities Act provides the other statutory foundation on which Federal civil rights protection for students with limited English proficiency rests. Under section 1703(f) of the act, school districts are required to take "appropriate action" to rectify language barriers that impede students' ability to participate effectively in the schools' education programs. The act provides a private right of action to students and their parents, as well as Federal enforcement of its nondiscrimination provisions. The U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section enforces the nondiscrimination provisions of the Equal Educational Opportunities Act.[38]

Although DOEd does not have enforcement responsibilities for the Equal Educational Opportunities Act, the act has nonetheless played a significant role in the development of OCR's Title VI policy related to students with limited English proficiency. OCR relies on the fifth circuit's interpretation of section 1703(f) of the Equal Educational Opportunities Act in the 1981 case of *Castaneda v. Pickard* as the analytical framework for its *Lau* compliance reviews. The Equal Educational Opportunity Act, in turn, was influenced by OCR's Title VI policy. Congress based the "appropriate action" language of section 1703(f) of the Equal Educational Opportunities Act on the U.S. Supreme Court's holding in *Lau* reiterating the OCR's May 1970 guidelines' requirement that schools take "affirmative steps" to ensure "meaningful access." Moreover, the concept of a remedial scheme reflected in the Equal Educational Opportunities Act's requirement for school districts to take affirmative steps or "appropriate action" underscores the importance of conducting civil rights enforcement activity that emphasizes the need for schools to develop and implement a proactive agenda on behalf of students.

The fifth circuit has provided the most influential Federal judicial interpretation of the language of the Equal Educational Opportunities Act. In the 1981 Equal Educational Opportunities Act case, *Castaneda v. Pickard*,[39] the fifth circuit set forth a three-part test for determining whether a school district has taken the appropriate action to overcome language barriers. This test now is generally accepted by the Federal Courts and OCR as a threshold for determining compliance with the mandates of *Lau* and the Equal Educational Opportunities Act. The test is based on a combination of education theory, practice, and results, and consists of the following:

> 1) the school system must pursue a program based on an educational theory recognized as sound by at least some experts in the field, or, at least, deemed a legitimate experimental practice;
>
> 2) the programs and practices actually used by the school system—including instructional practices, resources, and personnel—must be calculated to implement effectively the educational theory adopted by the school; and
>
> 3) the school's program, after a legitimate trial, must produce results indicating that the language barriers confronting the students are actually being overcome.[40]

Although Federal law and policy has established broad guidelines emphasizing the necessity for States and local school districts to provide instructional assistance to students in overcoming their language barriers, there remain controversial issues as to how best to meet these standards. These issues center around the goals of such programs with respect to 1) the most effective means of overcoming students' language barriers and achieving academic success on par with their English-proficient counterparts; and 2) na-

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37 *Id.*, at 569–70 (Justice Stewart, concurring).

38 The Commission is not evaluating the civil rights enforcement activities of the U.S. Department of Justice in this report.

39 648 F.2d 989 (5th Cir. 1981).

40 648 F.2d at 1009–10.

tive language proficiency of student participants. The use of native language skills in instructional programs for students with limited English proficiency and the goal of retaining the native language while developing English proficiency remain at the heart of the controversy.

OCR'S Title VI/Lau Regulations and Policy

In general, OCR implements and enforces Title VI in part to ensure equal educational opportunity and nondiscrimination in education programs for students with limited English proficiency. In conducting its implementation, compliance, and enforcement activities relating to education programs for these students, OCR focuses its efforts not on assessing the merits of the particular kind of program or approach the school has chosen to implement, but rather on ensuring the proper implementation of the program regardless of the approach the school district has chosen. OCR makes this assessment based on whether the school district is meeting the requirements and providing the resources necessary to fulfill the goals of a given program.[41] For example, the goal of traditional bilingual education is instruction in both English and the native language until the student can function in an all-English classroom. Schools or school districts that keep students in transitional bilingual programs even after they speak English proficiently do not implement the program correctly. A school district that establishes a dual language proficiency program, but then hires teachers who are not proficient in the student's native language would be another example of improper program organization that could result in a finding of non-compliance with Title VI.

By focusing on the proper implementation of education programs rather than the particular type of program a school is implementing, OCR has achieved two important goals. First, it has developed an approach to civil rights enforcement that seeks to ensure equal educational opportunity and nondiscrimination through the most direct means, namely, a careful review of the specific elements of education programs, such as requirements for teacher training and certification and parental notification and involvement. Through this method, OCR can determine whether each element operates effectively based on the requirements of the program itself. Second, OCR has maintained a policy of noninterference in State and local decisionmaking as to the type of program for serving students with limited English proficiency, thereby continuing to allow States and local educational agency the autonomy and flexibility they have traditionally enjoyed in developing and implementing education programs.

Title VI Regulations

The Title VI regulations[42] were published well before the *Lau* decision and the passage of the Equal Educational Opportunities Act. Although they do not make specific reference to students with limited English proficiency or *Lau* compliance issues, OCR relies on the Title VI regulations as the basis for its policies relating to students with limited English proficiency. In addition, OCR has issued policy guidance to support the Title VI regulations and offer interpretive guidance of the statute.

OCR's Current Title VI/*Lau* Policy

Under Title VI, *Lau*, and the fifth circuit's interpretation of section 1703(f) of the Equal Educational Opportunities Act in *Castaneda v. Pickard*, a failure to provide assistance to students with limited English proficiency is a violation of these students' civil rights. However, the specific form and substance of such assistance and the manner in which it will be rendered largely remain prerogatives of education policymakers at the State

41 *See generally* Angela Martinez, National *Lau* Facilitator, Denver Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 24, 27, 1996; Cathy Lewis, Acting Senior Enforcement Officer, U.S. Department of Education, Office for Civil Rights, interview in Washington, D.C., June 14, 1996.

42 34 C.F.R. Part 100 (1996).

and local levels and to some extent, the Federal level.

As the Supreme Court noted in its decision in *Lau v. Nichols*,[43] students with limited English proficiency often have been deprived of "meaningful education" in instances where the public education system has not assisted these students in overcoming language barriers which in turn prevented them from participating in regular educational programs. Moreover, the lack of appropriate instructional programs for some students with limited English proficiency has hindered their opportunity to achieve academic excellence. This is evident in the continuing problems of low performance on standardized and classroom tests, low grades, and high dropout rates.[44]

Title VI and the Equal Educational Opportunities Act mandate instructional assistance for students with limited English proficiency. Because the U.S. Supreme Court's holding in *Lau v. Nichols* adopted the Title VI policy advanced by OCR in the May 1970 guidelines, Title VI enforcement activities related to students with limited English proficiency are known as *Lau* enforcement activities. However, as noted above, OCR's primary analytical basis for determining Title VI compliance in *Lau* enforcement is the fifth circuit's tripartite standard, announced in *Castaneda v. Pickard*, interpreting the "appropriate action" language of the Equal Educational Opportunities Act.[45] OCR policy, therefore, is based on an interpretation of the language of section 1703(f) of the Equal Educational Opportunities Act, which requires school districts to take action to remove the "language barriers" that operate to deprive students with limited English proficiency from receiving an equal educational opportunity. However, there is no mention of section 1703(f) of the Equal Educational Opportunities Act in OCR's Title VI regulation nor in an appendix to the Title VI regulation. Thus, Federal civil rights policy since *Castaneda* has viewed Title VI compliance as a function of the "affirmative steps" language of the May 1970 guidelines and the similar "appropriate action" requirement of the Equal Educational Opportunities Act of 1974.

OCR's Title VI Policies Relating to Students with Limited English Proficiency

OCR has guided its Title VI/*Lau* compliance and enforcement activities of its staff principally through three policy documents: the May 1970 guidelines, the December 1985 memorandum, and the September 1991 policy update.

May 1970 Guidelines

The May 1970 guidelines provide the foundation for all later OCR policy by requiring recipients to take "affirmative steps." The guidelines set forth four basic requirements for Title VI compliance:

> (1) Where inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency to open its instructional program to these students;
>
> (2) Students may not be designated as mentally retarded or academically deficient on the basis of criteria that essentially measure and evaluate English language skills;
>
> (3) Any ability grouping or tracking system employed by the school system to deal with the special language needs of national origin minority group children must be designed to meet such language skill needs as soon as possible, but it must not work to lock students into a particular curriculum; and
>
> (4) Schools must notify parents of school activities in a language they can understand.[46]

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43 414 U.S. 463 (1974).

44 For more detailed discussion of achievement levels of students with limited English proficiency, *see* chap. 2.

45 September 1991 policy memorandum, p. 1. *See also* Lewis interview, p. 4.

46 35 Fed. Reg. 11,595 (1970).

The "affirmative steps" language in the May 1970 guidelines form one of two foundational elements in OCR policy.[47]

December 1985 Memorandum

The second policy document, the December 1985 policy memorandum, is noteworthy mainly for two reasons. First, this memorandum clearly sets forth the basic premise on which OCR bases its standard for conducting *Lau* enforcement activities. It states:

> In viewing a school district's compliance with Title VI regarding effective participation of language minority students in the educational program, OCR does not require schools to follow any particular educational approach. The test for legal adequacy is whether the strategy adopted works—or promises to work—on the basis of past practice or in the judgment of experts in the field. OCR examines all the available evidence within the analytical framework described, and determines whether the preponderance of evidence supports the conclusion that the district is implementing a sound educational program that ensures the effective participation of its language minority students.[48]

In addition, the December 1985 memorandum announces that OCR will determine *Lau* compliance on a "case-by-case basis."[49] The memorandum states that, "OCR reviews the compliance of school districts on a case-by-case basis. Any educational approach that ensures the effective participation of language minority students in the district's educational program is accepted as a means of complying with the Title VI requirements."[50] The memorandum stated expressly that:

> In providing educational services to language minority students, school districts may use any method or program that has proven successful, or may implement any sound educational program that promises to be successful. . .
>
> . . . A variety of factors influence the success of any approach or pedagogy. . . OCR staff is not in the position to make programmatic determinations and does not presume to make those decisions.[51]

The December 1985 memorandum states, "OCR avoids seeking educational judgments or second-guessing decisions made by local education officials. Instead, OCR looks at all the available evidence describing the steps taken to ensure that sound and appropriate programs are in place."[52] The December 1985 memorandum also outlines the steps OCR staff should take in determining whether a school district is in compliance with Title VI and *Lau*. It pinpoints two main questions staff must answer in a *Lau* review:

- whether there is a need for the district to provide an alternative program designed to meet the educational needs of all language minority students; and
- whether the district's alternative program is likely to be effective in meeting the educational needs of its language minority students.[53]

September 1991 Policy Update

In OCR's third and most recent policy update on schools' obligations to students with limited English proficiency, issued in September 1991, is its most comprehensive Title VI/*Lau* policy statement to date. In the September 1991 policy update, then-Assistant Secretary for Civil Rights Michael Williams stated:

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47 The other such element is the "appropriate action" language of section 1703(f) of the Equal Educational Opportunities Act which the fifth circuit interpreted as requiring its three-part *Castaneda* test. This test established the basis for OCR's current analytical approach in conducting *Lau* compliance reviews.

48 December 1985 memorandum, p. 7.

49 Ibid., p. 2.

50 Ibid.

51 Ibid., p. 3.

52 Ibid., p. 5.

53 Ibid., p. 3.

[g]enerally, 'success' is measured in terms of whether the program is achieving the particular goals the recipient[54] has established for the program. If the recipient has established no particular goals, the program is successful if its participants are overcoming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient's programs.[55]

OCR's Policies Defining Limited English Proficiency

OCR's policies and other written documents have not defined the term "limited English proficiency" or other related terms. In its policies and case letters, OCR has used the terms "national origin minority," "students whose primary home language is other than English," and "limited-English proficient" without providing clear definitions. Further, the Title VI regulations provide no definitions for these terms, and they offer no criteria for establishing when a student's language needs place him or her among the students *Lau* and the guidelines contained in the May 1970 memorandum intended to benefit. With definitions for these terms in policies, OCR could offer clearer guidance to school districts in identifying students who may need an alternative language education program to gain meaningful access to a school's regular educational program.

OCR's Title VI/Lau Policy Analysis

In general, OCR policy for determining compliance with Title VI is based on the following analysis:

1) whether there is a need for the school district to provide a special language service program to meet the needs of all students whose primary language is other than English and who have limited English proficiency (an alternative program); and

2) whether the districts' alternative program is likely to be effective in meeting the educational needs of its students whose primary language is other than English and who have limited English proficiency.[56]

Need for a Formal Program

OCR policy requires that school districts take the "affirmative steps" mandated in *Lau*, and OCR's Title VI regulations.[57] The *Lau* policy indicates: "Recipients should have procedures in place for identifying and assessing LEP students. As the December 1985 memorandum stated, if language minority students in need of an alternative language program are not being served, the recipient is in violation of Title VI."[58] The September 1991 policy update further details the requirements for school districts in undertaking "*Lau*-type" education programs.[59] The policy update states with respect to the need for a program that:

> Title VI does not require an alternative program if, without such a program, LEP students have equal and meaningful access to the district's programs. *It is extremely rare for an alternative program that is inadequate under* Castaneda *to provide LEP students with such access.* If a recipient contends that its LEP students have meaningful access to the district's programs, despite the lack of an alternative program or the presence of a program that is inadequate under *Castaneda*, some factors to consider in evaluating this claim are: (1) whether LEP students are performing as well as their non-LEP peers in the district, unless some other comparison seems more appropriate;[60] (2) whether LEP students are successfully participat-

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54 OCR refers to States and local school districts as "recipients" in its regulations and policy guidance, because these entities are the recipients of Federal funding.

55 September 1991 policy update, p. 9.

56 December 1985 memorandum, p. 3.

57 *See* 34 C.F.R. § 100.3(b)(6)(ii) (1996).

58 September 1991 policy update, p. 9.

59 September 1991 policy update.

60 For example, when an overwhelming majority of students in a district are LEP students, it may be more appropriate to compare their performance with their non-LEP peers county- or statewide.

ing in essentially all aspects of the school's curriculum without the use of simplified English materials; and (3) whether their dropout and retention-in-grade rates are comparable to those of their non-LEP peers. *Cf. Keyes*, 576 F. Supp. at 1519 (high dropout rates and use of "levelled English" materials indicate that district is not providing equal educational opportunity for LEP students).

If LEP students have equal access to the district's programs under the above standards, the recipient is not in violation of Title VI even if it has no program or its program does not meet the *Castaneda* standard. If application of the above standards shows that LEP students do not have equal access to the district's programs, and the district has no alternative language programs, the district is in violation of Title VI. If the district is implementing an alternative program, it then will be necessary to apply the three-pronged *Castaneda* approach to determine whether the program complies with Title VI.[61]

For school districts with small numbers of students with limited English proficiency, OCR requirements for implementing language assistance educational programs are substantially different in two important ways. First, OCR policy places far less stringent requirements for developing and implementing programs on such school districts. Second, OCR rarely conducts compliance reviews in districts with small numbers of such students. For example, in reference to school districts with "few LEP students," the September 1991 policy update states that: "at a minimum, school teachers and administrators should be informed of their obligations to provide necessary alternative language services to students in need of such services, and of their obligation to seek any assistance necessary to comply with this requirement."[62] It notes that "[t]he type of program necessary to adequately identify students in need of services will vary widely depending on the demographics of the recipients' schools."[63] However, the September 1991 policy update does not specify how many students constitute "few LEP students." OCR also conducts technical assistance directed toward State education agencies as a means of assisting smaller school districts.

In its 1994 Strategic Plan, OCR decided to direct most of its staff and resources on large school districts and, as a result, OCR may not be effective in reaching school districts with very small numbers of students with limited English proficiency.

Adequacy of Program

The September 1991 policy update provides far more detailed policy guidance to school districts in reference to the adequacy of a program that already exists. Some school districts have long-standing, well-developed programs in place. For these school districts, OCR deals mainly with "second" and "third generation *Lau*" issues.[64] In defining the meaning of these terms as they are used by OCR, an OCR official stated that: "First generation *Lau* is where [OCR] walk[s] into the district and [the school district] say[s] 'What? We have to provide services? Really? Why?'... Second and third generation *Lau* issues are just more sophisticated problems where in fact they have a program but they are not doing it effectively."[65] OCR's enforcement activities in these districts revolve largely around problems in implementation observed during complaint investigations or compliance reviews of schools with education programs already in place. Because school districts facing second and third generation *Lau* issues tend to be those with larger numbers of students with limited English proficiency, OCR policy focuses much more closely on these school districts than it does on those that have small numbers of such students.

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61 September 1991 policy update, p. 10 (emphasis added).

62 Ibid., p. 9.

63 Ibid.

64 Lewis interview.

65 Ibid., p. 5.

The three-part test enunciated by the fifth circuit in *Castaneda* remains the standard by which the courts judge school districts' compliance with the Equal Educational Opportunities Act. OCR has adopted the *Castaneda* standard in its policies for determining noncompliance with or proving discrimination under Federal civil rights law.[66] OCR continues to rely on the legal standards set forth by the fifth circuit in *Castaneda* as its primary analytical process in making determinations on compliance with Title VI and its implementing regulations. OCR uses this process as a means of ensuring that school systems are taking the required "appropriate steps" in providing education services to students with limited English proficiency. To meet with current compliance standards, OCR must determine that a school system has developed and is implementing a program that exhibits soundness of educational approach, is implementing that approach properly, and has in place appropriate evaluation mechanisms.[67]

Soundness of Educational Approach

Bilingual/bicultural education and ESL are some of the approaches recognized as sound under the first prong of *Castaneda*, but a district can choose another approach if it can show that it is recognized as sound by at least some experts in the field, or at least recognized as a legitimate educational strategy. The *Castaneda* standard's first prong accords an important role for education research as a means of determining the effectiveness of various aspects of program implementation in determining civil rights compliance. OCR uses this prong as the threshold in its inquiry when conducting compliance reviews and complaint investigations as part of its *Lau* enforcement activities. In adopting this prong, OCR has stated with respect to the school district's program that the program the recipient chooses must be recognized as sound by at least some experts in the field.[68]

Proper Implementation

OCR uses the second prong of *Castaneda* in its analysis of school districts' *Lau* compliance by determining whether "the programs and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school."[69] OCR examines a number of different aspects of program implementation in conducting this part of its inquiry. These include assessment and identification procedures,[70] staffing resources and requirements, instructional materials,[71] access to special education programs such as gifted and talented programs, and exit criteria.[72]

Program Evaluation

The third prong of *Castaneda* in OCR's analysis of a school district's *Lau* compliance consists of determining whether "the program succeeds, after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome."[73] Here, OCR's primary concern is whether the students are showing academic improvement based on such indicators as grade retention rates and levels of academic achievement reflected in grades and other indicators. In determining whether a school district has met this third prong, OCR applies such criteria as a comparison between students in the alternative language programs, students exited from alterna-

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66 September 1991 policy update, p. 9.

67 Ibid., p. 1.

68 Ibid.

69 Ibid.

70 *See* chap. 7 for detailed discussion on assessment and identification procedures.

71 *See* chap. 9 for a detailed discussion on staffing resources and requirements, and instructional materials.

72 *See* chap. 8 for a detailed discussion on special programs and exit criteria.

73 September 1991 policy update, p. 1.

tive language programs, and their counterparts in the school's regular educational program. If the comparison is not favorable, OCR will use this as an indication that the program is not meeting *Castaneda*'s third prong. OCR also requires a school to "periodically evaluate or modify its programs as appropriate" if the program is not successful.[74]

Each of the three prongs reflects what the September 1991 policy update refers to as a "common sense analytical framework for analyzing a district's program for LEP students."[75] As such, this standard mainly seeks to determine whether the school district's program is effective in meeting its goal for the students. Where OCR, using established criteria such as the comparison between the performance of students in the alternative language program and their peers in the school's regular educational program, determines the alternative language program is not effective in meeting its goal for the students, the program is in noncompliance with Title VI.

OCR's Written Letters of Finding

OCR's written instruments relating to enforcement and compliance activities, including letters of findings, and negotiated resolution agreements, typically refer to the legal basis for OCR's enforcement activities. The standard language OCR uses in its letters of findings to school districts includes the following:

> OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulation, Title 34, Code of Federal Regulations (C.F.R.), Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs or services receiving Federal financial assistance from the U.S. Department of Education (Department). The District is subject to OCR review because it is a recipient of Federal financial assistance from the Department.[76]

In addition, OCR's written communications to school districts provide a brief recitation of the legal standards OCR uses in conducting its enforcement activities. For example, the following is a representative example, based on a review of OCR's letters of findings addressing *Lau* issues, of the summary of legal standards that OCR typically provides to school districts:

> The regulation implementing Title VI, at 34 C.F.R. § 100.3(a) and (b), provides that a recipient may not, directly or through contractual or other arrangements, on ground of race, color, or national origin, restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service. A recipient also may not deny an individual the opportunity to participate in the recipient's program or afford an individual an opportunity to do so which is different from that afforded others.
>
> OCR's May 25, 1970 policy memorandum, "Identification of Discrimination and Denial of Services on the Basis of National Origin" (May 1970 memorandum), advises school districts of their responsibility under Title VI to provide *equal educational opportunity* to national-origin-minority students who are deficient in English language skills. Where inability to speak and understand the English language excludes such students from *effective participation* in a district's educational program, the district must take *affirmative steps* to rectify the language deficiency in order to *open its instructional program* to these students. In *Lau v. Nichols*, 414 U.S. 563 (1974) (*Lau*), the United States Supreme Court upheld OCR's policies set forth in the May 1970 memorandum. . . In *Castaneda v. Pickard*, 648 F.2d 989 (5th. Cir. 1981) (*Castaneda*), the appeals court delineated a three-pronged standard for determining whether LEP students have equal and meaningful access to a district's program. . . [the LOF identifies the three-pronged *Castaneda* test here]. . . OCR's December 3, 1985 policy memorandum, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures" (December 1985 memorandum), and the September 27, 1991 policy memorandum, "Policy Update on School's Obligations Toward National Origin

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74 September 1991 policy update.

75 Ibid., p. 2.

76 Cathy H. Lewis, Regional Director, Region VIII, Letter of Findings Issued to Gladys Muniz Hannon, Superintendent, Phoenix Elementary Schools, District #1, June 1, 1993 (hereafter cited as Lewis LOF, dated 6/1/93).

Minority With Limited English Proficiency (LEP Students)" (September 1991 memorandum), clarify OCR's standard for determining compliance with the May 1970 memorandum, in light of *Castaneda*, other court cases, and *OCR enforcement experience* The above policies and procedures guided OCR's review to determine whether the District is in compliance with Title VI in providing equal educational opportunities to LEP students" (emphasis added).[77]

OCR's letters of finding are the most important written contact between OCR and school districts, and the analyses of compliance standards enunciated therein ought to be thorough and clear. However, a review of OCR case letters reveals that OCR's letters of finding in *Lau* cases generally do not provide a thorough explication or analysis of OCR policy on important compliance issues affecting the school district. For example, the above text provides the school district with a concise summary of the legal underpinnings of OCR's enforcement policy. OCR's *Lau* policy documents and written communications with school districts, such as letters of finding, appear to rely heavily on such legal terms of art as "effective participation" and "meaningful access" without providing practical meaning for these terms through examples, specific criteria or further explication or elaboration. The summary contained in the excerpt from the *Lau* letter of finding cited above, for example, fails to make an *explicit* connection between the term "equal educational opportunity" and the other terminology used, such as "effective participation," "affirmative steps," "open its instructional program to these students," and "a legitimate trial." Establishing the meaning of equal educational opportunity in relation to "effective participation," "affirmative steps," and the opening of the school's instructional program, would assist school districts in understanding their Title VI/*Lau* obligations. A sentence displaying such an explicit connection might read: "Equal educational opportunity may be afforded these students only by taking affirmative steps to provide them the effective participation enjoyed by their English proficient peers." This language is clearer and more direct in advising the school district as to its obligations and the practical meaning of these terms. OCR's language in this letter of findings[78] does not explain sufficiently to the school district in practical terms the meaning of the legal terminology it uses.

The terms "excludes from effective participation," "affirmative steps," and "open its instructional program" beg some standard of comparison for the school district to use in measuring their ability to meet these requirements. For example, the summary lacks an explanation for how a school district determines what constitutes "effective participation." In addition, the summary fails to identify the level of effort required by the school district in taking "affirmative steps." It also fails to address the specific way in which the school can ensure that it has "opened its instructional program to these students." Moreover, the text of the letter of finding's[79] brief mention of "OCR's enforcement experience," seems far too cursory a reference for such an important point. This text should contain as much detail in describing what the experience is as it has in setting forth the legal background.

In general, OCR's policy guidelines provide a cohesive articulation of the procedural analysis it uses in implementing and enforcing Title VI. However, the effectiveness with which OCR presents information to school districts in written communications such as letters of findings could be improved upon by elaborating on the practical meanings of various terminologies used in its policy guidance and other written guidelines. Such elaboration should include specific criteria and examples.

Proving Discrimination

In conducting Title VI/*Lau* complaint investigations and compliance reviews, OCR relies on various legal theories for determining Title

77 Lewis LOF, dated 6/1/93.

78 Ibid.

79 Ibid.

VI/*Lau* compliance. OCR may base a finding of discrimination under Title VI/*Lau* on disparate treatment, disparate impact, or a denial of equal participation. Historically, courts and OCR have applied to Title VI cases the burden of proof tests developed in litigation arising from Title VII of the Civil Rights Act of 1964.[80] Disparate treatment occurs when the recipient[81] of Federal funds takes an adverse action against the complainant because of the complainant's race, color, or national origin.[82] Disparate impact occurs when a recipient's facially neutral policy adversely affects one group of a particular race, color, or national origin more than another, without an educational justification.[83] Disparate impact cases do not require proof of the recipient's discriminatory motive.[84] The third "theory" of discrimination under Title VI/*Lau*, denial of equal or effective participation, derives from the language of the Supreme Court in *Lau* and the statutory language of the Equal Educational Opportunities Act. Under this theory, discrimination occurs when students are denied effective participation in a school's educational program.

Disparate Treatment

OCR's Title VI regulations prohibit disparate treatment in a variety of activities related to federally assisted education programs.[85] OCR's Title VI regulations state that a recipient under any federally funded program may not:

> directly or through contractual service or other arrangements, on ground of race, color, or national origin: (i) [d]eny an individual any service, financial aid, or other benefit provided under the program; (ii) [p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program.[86]

Under a disparate treatment analysis, the complainant must prove that the recipient intentionally discriminated. However, a complainant need not provide direct proof of intentional discrimination and may rely on circumstantial evidence to establish discriminatory intent by inference.[87] Under Title VI, a complainant who alleges intentional discrimination may initially establish a

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80 *See* 42 U.S.C. § 2000e–17 (1994). *See also* OCR, "Minority Students and Special Education" (citing Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983); Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986); Georgia State Conferences of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); and Dillon County Dist. No. 1 and South Carolina State Dep't of Educ., No. 84–VI–16 (Civil Rights Reviewing Authority 1987) (Policy Codification System Doc. No. 180).

81 For purposes of this discussion, "recipient" represents any and all possible respondents to a Title VI complaint, such as subrecipients.

82 International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

83 Board of Educ. v. Harris, 444 U.S. 130, 151 (1979) (in disparate impact cases in the education context, defendants are required to show an educational necessity instead of a business necessity). *See* International Bhd. of Teamsters v. United States, 431 U.S. at 360–62 and n.46 (establishing Title VII business necessity analysis). *See also* OCR, "Minority Students and Special Education."

84 International Bhd. of Teamsters v. United States, 431 U.S. at 335–36, n.15.

85 34 C.F.R. § 100.3(b)(1)(i)–(vi) (1996).

86 34 C.F.R. § 100.3(b)(1)(i)–(ii) (1996).

87 For disparate treatment cases relying on indirect and circumstantial evidence, *see* McDonnell Douglas v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). For disparate treatment cases relying on direct evidence, *see* Dothard v. Rawlinson, 433 U.S. 321 (1977); and International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991). The Civil Rights Act of 1991 does not address the burden of proof in disparate treatment cases. The act does, however, address damages in cases of intentional discrimination. Pub. L. No. 102–166, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (1994)). In the education context, *see* Dayton v. Brinkman, 443 U.S. 526, 536 n.9 (1979); Columbus v. Penick, 443 U.S. 449, 464–65 (1979); Milliken v. Bradley, 418 U.S. 717, 725, 745 (1974).

prima facie case of discrimination by demonstrating each of four key elements. First, the complainant must demonstrate that he or she is of a particular race, color, or national origin. Second, the complainant must show that he or she was qualified to receive the benefits, aid, or services of the federally assisted program. This element can be satisfied by a variety of activities that demonstrate opportunity, such as meeting eligibility requirements or completing appropriate applications. Next, the complainant must demonstrate that he or she was:

1) denied an opportunity to participate in a federally assisted program because of his or her race, color, or national origin;
2) limited in his or her ability to participate in a federally assisted program because of his or her race, color, or national origin;
3) denied access to the benefits or services of a federally assisted program because of his or her race, color, or national origin; and/or
4) rejected from participating in a federally assisted program because of his or her race, color, or national origin.

Finally, the complainant must show that the benefits, aid, or services of the federally assisted program remained available or accessible to others of a different race, color, or national origin.[88]

OCR's general approach to investigating Title VI cases under the disparate treatment theory is laid out in a July 6, 1995, memorandum from Assistant Secretary Norma V. Cantú to all OCR staff on legal approaches for investigations relating to minority students and special education.[89] The memorandum explains that a disparate treatment case "can be pursued on a class-wide or individual basis."[90] The first step in a disparate treatment investigation is to "determine if there are any apparent differences in the treatment of minority and nonminority students who appear to be similarly situated."[91] The second step is to "assess the recipient's explanation for any difference in the treatment of students to determine if

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88 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Once the complainant's initial burden has been met, the respondent can provide evidence refuting the complainant's case. While the complainant's initial burden in disparate treatment cases under both Title VII and Title VI has remained consistent, the courts have continued to debate what role the initial burden has in ultimately proving intentional discrimination. In a 1993 Title VII case, the Supreme Court clarified the respective burdens of complainants and respondents once the prima facie case is established. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Supreme Court revisited the precedents established in *McDonnell Douglas Corp. v. Green* and *Texas Dept. of Community Affairs v. Burdine*.
Justice Scalia, writing for the five-justice majority in *Hicks*, held that if the complainant successfully demonstrates a prima facie case of intentional discrimination by direct or circumstantial evidence, a rebuttable presumption of intentional discrimination is created. Hicks v. St. Mary's Honor Center, 509 U.S. at 506–07 (1993). According to the Court, the presumption is merely a court-created procedural device that allows a conclusion to be drawn from the asserted facts and shifts the burden of producing evidence to the respondent. However, the complainant always maintains the ultimate burden of persuading the trier of fact that the respondent intentionally discriminated. 509 U.S. at 508.
Once the presumption of intentional discrimination is established, the respondent must produce evidence of a legitimate, nondiscriminatory explanation for the adverse action, and that evidence must rebut the presumption. 509 U.S. at 506–07. The respondent need only present evidence of a legitimate reason, and need not demonstrate that he or she was actually motivated by the nondiscriminatory reasons offered. 509 U.S. at 510–11. If the respondent produces such evidence, then the complainant must be able to show that the nondiscriminatory reasons offered by the respondent were merely a pretext for intentional discrimination. 509 U.S. at 508. According to a majority of the Supreme Court, a complainant cannot demonstrate that the nondiscriminatory reasons were mere pretext unless he or she proves "both that the reason was false, *and* that discrimination was the real reason" for the adverse action. 509 U.S. at 515 (emphasis deleted). To date, the Federal courts have not cited *Hicks* in a Title VI or an education case. However, because the earlier disparate treatment cases have been applied consistently to Title VI, it appears that the Federal courts will likely follow the recent clarifications.

89 Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to All Staff, July 6, 1995 (hereafter cited as Cantú, "Legal Approaches for Investigations").

90 Ibid., p. 3.

91 Ibid.

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the reasons are legitimate or are merely a pretext for unlawful discrimination."[92] The memorandum elaborates further on how OCR investigators should pursue a classwide or "pattern and practice" disparate treatment case. In a classwide case, the investigation begins with "a statistical demonstration that students of a protected group are disproportionately denied the opportunity to benefit from a program or are otherwise harmed."[93] If there is a facially neutral reason for the statistical disproportion, the case proceeds under the disparate impact theory (discussed below). If not, then the recipient must show that no discrimination is occurring. The recipient can do this "by showing that the statistics are inaccurate or insignificant, or by providing a non-discriminatory explanation for the statistics."[94] OCR investigators then must determine whether or not the recipient's "stated reason is really a pretext for discrimination."[95]

In the context of OCR's Title VI/*Lau* investigations, OCR relies on the *Castaneda* framework in finding a violation where a school district is engaging in differential treatment based on national origin in the implementation of an educational practice or program. For example, if a school district treats students who are members of a racial or national origin group differently from other similarly situated students who are not members of that minority group by testing them differently or exclusively without providing a legitimate justification, then the school district is in violation of Title VI.[96]

Disparate Impact

Executive branch constructions of the nondiscrimination provision of Title VI developed in DOEd's Title VI regulations have proven particularly effective in advancing the use of the disparate impact theory in determining compliance with Title VI. In its decision in *Lau*, the U.S. Supreme Court accorded substantial weight to departmental regulations that sought to establish a theoretical and practical framework for implementing and enforcing the statutory nondiscrimination requirement.[97]

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92 Ibid.

93 Ibid. The disproportion must be statistically significant. Ibid.

94 Ibid.

95 Ibid.

96 *See, e.g.*, Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Dennis Clancy, Superintendent, Franklin Township Public Schools, Somerset, New Jersey, re: Case No. 02–92–1004, Mar. 6, 1992 (hereafter cited as Kuebler LOF, Mar. 6, 1992). OCR investigated a complaint that alleged that the school district treated students with last names that identify them as Asian differently from other students by requiring categorical testing of these students for placement in ESL programs. Ibid., p. 2. However, OCR determined that the school's policies and procedures for identifying students with a native language other than English were neutral because they require the school to survey all new students regardless of their last names. Ibid., p. 4.

97 414 U.S. 563, 566–571. In 1983, a plurality of the Court reaffirmed the importance of executive regulations when it agreed that a plaintiff may establish a civil rights violation based on Title VI regulations that employ a discriminatory effects test as a standard for compliance with the statute's nondiscrimination provision. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). In *Guardians Ass'n v. Civil Serv. Comm'n*, four Justices sought to impose an intent requirement as a necessary element of a Title VI violation. *Id.* at 610–11 (concurring opinion of Justice Powell, joined by Justices Burger and Rehnquist, J.); *id.* at 615 (opinion of Justice O'Connor.) However, the remaining justices split on the issue. Two believed that Title VI did not require proof of discriminatory intent. *Id.* at 589–93 (opinion of Justice White); *id.* at 616–24 (dissenting opinion of Justice Marshall) The remaining three Justices distinguished Title VI's requirements from those under administrative regulations promulgated to enforce it. In their view, a plaintiff needed proof of discriminatory intent only to establish a violation of Title VI *itself*, but not to prove noncompliance with a statutory regulation that employed an effects test. *Id.* at 639–45 (dissenting opinion of Justice Stevens, joined by Justices Brennan and Blackmun); *see also* Larry P. v. Riles, 793 F.2d 969, 981–82 (9th Cir. 1984) (concluding that under Guardians Ass'n, plaintiffs could rely on an effects test under regulations issued pursuant to title VI that established such a standard, although proof of discriminatory intent was necessary to establish a violation of Title VI itself).

Lau and OCR's May 1970 guidelines established disparate impact as a legal standard for determining whether a school district's education program discriminates against students with limited English proficiency. This standard can be analogized to the disparate impact standard enunciated by the Court in the employment setting in *Griggs v. Duke Power Company*.[98] In *Griggs*, the Court identified the appropriate legal standard under which an employer's actions may be evaluated under Title VII of the Civil Rights Act of 1964.[99] In the context of OCR's evaluation of a school district's education program, an impermissible (i.e., discriminatory) school district policy or educational practice would be one that (1) results in a disparate impact or effect on students with limited English proficiency as compared to their English proficient peers, and (2) is not educationally necessary.

OCR's civil rights implementation, compliance, and enforcement activities have rested on an effects theory since the time of the May 1970 guidelines. The specific provision in the May 1970 guidelines that was upheld by the U.S. Supreme Court in *Lau* indicated that:

> Where inability to speak and understand the English language excludes national-origin minority group children from effective participation in the educational program offered by the school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[100]

In *Lau*, the majority approved this guideline as being "reasonably related" to the objective of nondiscrimination set forth in Title VI.[101] Moreover, the majority noted that: "in assessing the purposes of remedial legislation we have found that departmental regulations and 'consistent administrative construction' are 'entitled to great weight.' . . . The Department has reasonably and consistently interpreted section 601 to require affirmative remedial efforts to give special atten-

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98 401 U.S. 424 (1971). Historically, Federal courts and the Department of Education have applied to Title VI cases the legal analyses that developed under Title VII of the Civil Rights Act of 1964. *See, e.g.*, Norma V. Cantú, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to all staff, "Minority Students and Special Education," July 6, 1995 (citing, Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983)); Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986); Georgia State Conferences of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); and Dillon County District No. 1 and South Carolina State Department of Education, No. 84–VI–16 (Civil Rights reviewing Authority 1987) (Policy Codification System Doc. No. 180).

99 42 U.S.C. § 2000e (1994). The U.S. Commission on Civil Rights has discussed this analogy in its report *The Fair Housing Amendments Act of 1988: The Enforcement Report*. There, the Commission wrote that: "By analogy from the Supreme Court's decision in *Griggs*, a complainant established a prima facie case of *disparate impact* [emphasis added] by showing that a neutral policy caused a disproportionate exclusion of a protected class (i.e., race, color, national origin, gender). This prima facie case created an inference of discrimination that shifted the burden of persuasion to the respondent to show that the discrimination was justified by a business necessity. In *Wards Cove* the Supreme Court clarified the balance of burdens by indicating that the complainant carried the ultimate burden of persuasion throughout the case as in disparate treatment cases. In the 1991 Civil Rights Act, Congress overruled much of the Court's decision in *Wards Cove*." U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, September 1994, p. 161, citing *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) and the Civil Rights Act of 1991, 42 U.S.C. § 2000e (1994). Congress' overruling of *Wards Cove* restored the burden shift to the respondent to show that discrimination was justified by business necessity.

100 May 1970 guidelines.

101 414 U.S. 563, 571 (Justice Douglas, writing for the majority, stated: "[t]he critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of section 601 . . . Last Term, in Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369, we held that the validity of a regulation promulgated under a general authorization provision such as section 602 of Title VI . . . 'will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280–281 (1969). I think the guidelines here fairly meet that test.").

tion to linguistically deprived children."[102] The majority's approval of this provision signaled that the Court and the executive branch had agreed on an interpretation of Title VI that focused on the impact of the school district's actions on students with limited English proficiency. Since *Lau*, OCR has based its civil rights implementation, compliance, and enforcement on assessing a school system's actions based on the *effects* of those actions on students with limited English proficiency, regardless of the school's intentions. OCR's specific focus has been on the access of students with limited English proficiency to the regular educational program being offered by the school district.

In addition, the Federal courts have interpreted the Equal Educational Opportunities Act to permit a finding of a violation based on disparate impact.[103] Importantly, the *Castaneda* standard provides a sound and appropriate basis for civil rights enforcement activities. The soundness and appropriateness of the *Castaneda* standard as a basis for civil rights enforcement activities derives principally from its reliance on an effects test developed earlier by OCR in its May 1970 guidelines and adopted by the U.S. Supreme Court in *Lau*.

Assistant Secretary Cantú's July 6, 1995, memorandum on legal approaches for investigations relating to minorities and special education details OCR's general approach to a disparate impact investigation.[104] The memorandum states that for policies and practices that have a disparate impact on the basis of race or national origin to be permissible, they "must be educationally necessary." The memorandum lays out several steps for OCR investigators to follow in pursuing a disparate impact case. First, the investigator must determine whether there has been "a disproportionate denial of opportunity to benefit from a program."[105] Second, the investigator should determine whether the disproportion is caused by a "neutral policy, process or practice."[106] If not, the investigation proceeds as a disparate treatment case (discussed above). Otherwise, the disparate impact investigation proceeds. The third step in the disparate impact investigation is for the investigator to determine whether a specific aspect of the process led to the disproportion, or whether it is the entire process that is the cause. The fourth step is to consider whether the specific aspect (or the entire process) is educationally necessary. The memorandum states that "[i]f the evidence does not establish that the policy, procedure, or practice is necessary to meet an important educational goal, then it must be eliminated."[107] Even if the investigation finds that the policy is educationally necessary, the investigator must take the fifth step of determining whether an alternative practice exists that the recipient does not use and that is less discriminatory. If so, then the recipient is in violation of Title VI.[108]

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102 *Id.* (citing Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210; Griggs v. Duke Power Co., 401 U.S. 424, 433–434; Udall v. Tallman, 380 U.S. 1).

103 *See* Terri Lynn Newman, *Comment: Proposal: Bilingual Education Guidelines for the Courts and the Schools*, 33 Emory L.J. 577, at 594–95, n87 (1984) (hereafter cited as Newman, *Bilingual Education Guidelines for the Courts and the Schools*) (citing Martin Luther King, Jr. Elem. Sch. Children v. Michigan Bd. of Educ., 463 F. Supp. 1027, 1032 (E.D. Mich. 1978) (noting that under § 1703(f) "the connection between failure to take appropriate action and race need not be in the form of an allegation of racially discriminatory purpose but may also take the form of an allegation of racially discriminatory effect"); and Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 63 (E.D.N.Y. 1978) (holding a proposed restructuring of bilingual education plan violated § 1703(f) even though the purpose of the restructuring was to account for a reduction in qualified bilingual education teachers following a court order that stated that teachers were to be dismissed and that the order of dismissal was to be determined by their lack of seniority. More bilingual education teachers were released than English-speaking teachers, thus causing a disparate impact in the bilingual program)).

104 *See* Cantu, "Legal Approaches for Investigations," pp. 4–5.

105 Ibid., p. 4.

106 Ibid.

107 Ibid., p. 5.

Denial of Equal Participation

When language barriers impede "equal participation by students in [a schools'] instructional programs," section 1703(f) of the Equal Educational Opportunities Act requires the school to take "appropriate action" to overcome the language barriers.[109] Failure by a school to take such "appropriate action" amounts to a denial of equal educational opportunity.[110]

The Equal Educational Opportunities Act introduced the notion of a proactive remedial plan to ensure nondiscrimination and equal educational opportunity. Section 1703(f) of the act refers to "appropriate action" as a means of ensuring nondiscrimination and civil rights compliance. As originally proposed in 1972, this legislation sought to prevent and remedy civil rights violations and to promote nondiscrimination through an emphasis on the quality of education programs.[111]

The Equal Educational Opportunities Act provides a Federal statutory underpinning for civil rights protection through a proactive and remedial approach. In interpreting its provisions, the Federal courts have focused on ensuring that schools provide equal participation. This interpretation appears consistent with the legislative history and the plain language of the statute. There is very little legislative history on the statute. The provision related to students with limited English proficiency was a floor amendment without accompanying debate. However, a 1972 report on the Equal Educational Opportunities Act issued by the House Committee on Labor and Education stated that:

> [T]he committee wants to commend the Department of Health, Education, and Welfare for having initiated recently compliance reviews of school districts throughout the country to ascertain whether they have fulfilled their affirmative obligation under title VI . . . As President Nixon has stated, these children will not have true equality of educational opportunity until . . . language and cultural barriers are removed.[112]

A violation of section 1703(f) of the act may be found if four elements are proven.[113] First, a language barrier must exist. Second, this language barrier must impede the equal participation of the adversely affected group in the educational program. Third, the school must have failed to take appropriate action to overcome the language barrier faced by the adversely affected group. Fourth, the race, color, sex, or national origin of the group adversely affected by the language barrier must be the cause of the failure to take appropriate action. A violation of these four elements denies children the right of equal participation by failing to overcome language barriers.[114] The act pro-

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108 Ibid.

109 20 U.S.C. § 1703(f) (1994).

110 *Id.*

111 President Nixon specifically addressed his administration's goals with regard to equal educational opportunity when he first proposed the Equal Educational Opportunities Act in 1972. He stated that the statutory purpose would be to shift the emphasis on busing as a remedial scheme for civil rights violations and to focus instead on the quality of education programs as a means of remedying past civil rights violations and at the same time preventing new ones. He suggested that an emphasis on the quality of education programs would accomplish civil rights goals far more effectively than the remedy of busing. With this legislation, he sought to portray equal educational opportunity as an *alternative* to busing. As such, he introduced the proposed legislation in an address to the Nation by stressing, "It is time for us to make a national commitment to see that schools in the central cities are *upgraded* so that the children who go there will have just as good a chance to receive a quality education as do the children who go to school in the suburbs." Educational Opportunity and Busing: The President's Address to the Nation Outlining his Proposals, 8 Weekly Comp. Pres. Doc. 590 (Mar. 16, 1972).

112 H.R. Rep. No. 1335, 92d Cong., 2d Sess. 6 (1972).

113 Martin Luther King, Jr. Elem. Sch. Children v. Michigan Bd. of Educ., 473 F. Supp 1371, 1374–75 (E.D. Mich. 1979).

114 Newman, *Bilingual Education Guidelines for the Courts and the Schools*, at 595, n.90 (citing Rios v. Reed, 480 F. Supp. 14, 22 (E.D.N.Y. 1978) (stating that the statutory obligation under § 1703(f) to provide equal educational opportunity required

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vides a remedy to this denial of equal or effective participation by requiring that language barriers be overcome.[115]

In *Castaneda v. Pickard*,[116] the fifth circuit enhanced Federal judicial interpretation of the act by providing a pragmatic approach to clarifying the legal meaning of "appropriate action" to ensure against a denial of equal participation for students with language barriers. In adopting the *Castaneda* standard for determining whether the school district has taken "appropriate action," OCR's analytical approach[117] to evaluating education programs reflects the act's emphasis on schools' efforts to overcome language barriers. Under the *Castaneda* standard, school districts must develop programs and practices that are implemented properly and provide equal participation and access to the regular educational program. Therefore, OCR may find a civil rights violation where a school district fails to implement its education program properly and therefore does not meet its obligation to take "appropriate action." In addition, OCR may find a violation where a school district fails to achieve either equal or effective participation in the schools' regular educational program for such students.

Where OCR, in its May 1970 guidelines, and the Supreme Court, in *Lau*, have required "effective participation" Congress mandated that schools provide "*equal* participation." The two terms, while seemingly similar, may be interpreted to have quite different meanings. Of the two, "equal participation" seems far more consistent with the spirit and intent of Title VI. In addition, the equal treatment mandated by the Court in *Brown v. Board of Education* arguably should apply under an equal protection analysis. These are important differences between the meanings of the terms "equal" and "effective" participation. Because the term "effective" can be viewed as something less than "equal," it appears there is confusion as to what the requirement for school districts actually means. The term "equal," however, is far less ambiguous, has stronger precedent behind it, and would therefore provide a standard more consistent with the principles of equal opportunity. However, OCR does not have enforcement responsibility for the Equal Educational Opportunities Act. It cannot develop interpretive or substantive regulations on the meaning of these two terms. In addition, the presumably stronger language of "equal participation" can not be used in Title VI/*Lau* because OCR's basis is "effective participation."

Although enforced by the U.S. Department of Justice (DOJ), the provisions of the Equal Educational Opportunities Act, in particular section 1703(f) relating to overcoming language barriers, are very closely related to the work done by OCR. Therefore, the Department of Justice and OCR should coordinate more closely in ensuring that the legal obligations for States and local school districts contained in the provisions of the Equal Educational Opportunities Act are implemented properly.

Equal Educational Opportunity as a Proactive Program for Civil Rights Implementation, Compliance, and Enforcement Efforts

Investigative Guidance, Model Investigative Plans, Procedures, Handbooks, and Manuals

OCR has developed a number of investigative guidance documents, procedures, handbooks, and

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that children *must* be given the same opportunity to learn as their classmates who speak English. The court thus implied a right to an alternative language education program as a means of providing children with limited English proficiency equal participation in the schools)).

115 Newman, *Bilingual Education Guidelines for the Courts and the Schools*, at 595.

116 648 F.2d 989 (5th. Cir. 1981).

117 September 1991 policy memorandum, p. 1. *See also* Cathy Lewis, Acting Senior Enforcement Officer, U.S. Department of Education, Office for Civil Rights, interview in Washington, D.C., June 14, 1996, pp. 3–4.

other documents that help applicants, recipients, beneficiaries, and the public in understanding and complying with civil rights requirements and that provide systematic guidance to assist OCR staff in their investigations. Providing such guidance relative to OCR's high-priority issue areas has been a major focus of OCR's activities in recent years. It has been OCR's practice to resolve internal differences among the regions. If OCR's regional offices confront difficulties in resolving a case because of different approaches among the regions, OCR will issue investigative guidance to clarify the issue.[118] OCR has begun to share its investigative guidance with the public so that they are more informed of OCR's "rules" and requirements.[119]

In 1985 and 1987, OCR issued investigative guidance relating to students with limited English proficiency at the headquarters level. The 1985 guidance contains OCR's "Title VI Minority Language Compliance Procedures," outlining OCR's current operating procedures for conducting investigations of districts enrolling students with limited English proficiency.[120] The 1987 guidance contains a copy of an investigative plan for Title VI/*Lau* reviews as a guide to regional offices in preparing *Lau* reviews.[121] Beyond these headquarters documents, OCR regional offices also have created model plans and guidance to assist schools that serve students with limited English proficiency in developing Title VI *Lau* plans and to assist OCR investigators in conducting *Lau* compliance reviews.[122]

In addition to these materials, OCR has devoted sections of its section 504/Title II and Title VI manuals to issues relating to students with limited English proficiency. The section on treatment of students with limited English proficiency in the Title VI manual summarizes OCR's current policy on the provision of equal educational opportunity, under Title VI, for national origin minority group students who are limited English proficient. It lists the statutes, regulations, and executive orders related to the topic, as well as OCR's policies, training materials, and other related documents on the topic. It also lists education articles and reports on a broad range of topics, such as historical backgrounds, teaching strategies, language development, testing and evaluation methods, research studies, and educational debates. This section of the Title VI manual also describes the functions and services of the National Clearinghouse for Bilingual Education to offer readers more sources of information on limited English proficient students. The section ends with a summary of case law on the requirements for educating students with limited English proficiency and OCR's case letters related to this topic.[123]

Selecting Issues and Targeting Districts for Compliance Reviews and Developing the Regional Enforcement Docket

Before an OCR enforcement office conducts a compliance review, the office does preliminary research to pinpoint districts with potential prob-

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118 Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, interview in Washington, DC, July 30, 1996, p. 4 (hereafter cited as Cantú interview).

119 Cantú interview, p. 4.

120 *See* Harry M. Singleton, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, memorandum to Regional Civil Rights Director, Regions I–X, "Attachment to Model Letter to School District with Approved *Lau* Plans," Dec. 3, 1985.

121 *See* Alicia Coro, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, memorandum to Regional Civil Rights Directors, Region I–X, "Investigative Plan for Title VI *Lau* Reviews," Feb. 26, 1987.

122 U.S. Department of Education, Office for Civil Rights, Region IV, model plan outline (unofficial) (received from OCR Region IV office during onsite visit, June 4, 1996); U.S. Department of Education, Office for Civil Rights, Region VII, investigative guidance (received from OCR Region VII during 2nd Annual Civil Rights Summit in Kansas City, MO, Summer 1995).

123 *See* U.S. Department of Education, Office for Civil Rights, *Title VI Manual* (selected excerpt as retrieved from OCR's Electronic Library) (Section 625—Treatment of Limited-English Proficient Students).

lems in selected issue areas. This preliminary research involves reviewing and verifying in-house statistics as well as data requested from the State education agency or the local education agency. It also may involve Internet searches, searches for anecdotal information, and discussions with focus groups and meetings with community and advocacy groups. Based on this preliminary research and the list of OCR priority issues, the enforcement office decides which cases are "ripe for investigation" and places these cases on its proposed enforcement docket, which it sends to headquarters for review and approval.[124]

In preparing their annual enforcement dockets, OCR's regional enforcement offices gather information to select issues and target districts for compliance reviews. In selecting issues for compliance reviews, the regional enforcement offices consider OCR's high-priority issues as well as issues that are important in the States in their regions.[125] According to the head of the Seattle Enforcement Office, "we go through a process of contacting advocacy groups, focus groups, public interest groups, State education agencies, and educators asking them to identify what their sources tell them are the focus civil rights issues in the area."[126] The Philadelphia Enforcement Office has a planning team that is responsible for developing the enforcement docket based on their research on the priority issues.[127]

In selecting districts for compliance reviews, OCR no longer selects districts randomly, nor does it select districts based solely on a statistical analysis of data collected by OCR.[128] Staff collect information from a variety of sources and usually seek input from stakeholders, such as advocacy groups and parents.[129] OCR's priority is to select compliance review sites that will have the greatest impact on students. OCR seeks input from State education agencies on which districts have been in noncompliance or have potential compliance problems.[130] For instance, Jim Littlejohn, the head of OCR's Kansas City Enforcement Office, described the selection process for *Lau* reviews in his office as follows:

> Each year on an ongoing basis, we collect information about schools in the region that comes to our attention or we seek it out. We look at a variety of information, the demographics of the school system, how many national origin students are present, as a starting point, then we will get information from a combination of sources, officials, state representatives, community individuals, civil rights groups, that would indicate to us that there might be a significant number of limited English proficient students in the districts. We also try to identify whether there may be any issues or concerns around the services delivered to those students. The variety of sources also include newspaper articles. We are really trying to identify where OCR's limited resources might be better used.[131]

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124 *See, e.g.*, Brenda Wolff, Program Manager, Philadelphia Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 11, 1996, pp. 1–2 (hereafter cited as Wolff interview).

125 *See* George Cole, Special Project Team, Dallas Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 26, 1996, pp. 2–3; Lewis interview, p. 6.

126 Gary Jackson, Enforcement Director, Seattle Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 14, 1996, p. 1 (hereafter cited as Jackson interview).

127 Wolff interview, p. 1.

128 *See, e.g.*, Robert Smallwood, Enforcement Director, New York Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 11, 1996, p. 3.

129 *See* Maria Bates, Special Project Team Member, Dallas Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 26, 1996, p. 4 (hereafter cited as Bates interview); Helen Whitney, Enforcement Director, New York Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 20, 1996, p. 2 (hereafter cited as Whitney interview).

130 *See* Angela Martinez, National *Lau* Facilitator, Denver Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 24, 27, 1996, p. 2 (hereafter cited as Martinez interview); Whitney interview, p. 5; Jackson interview, p. 3.

The head of the Atlanta Enforcement Office indicated that his office reviews statistical data on school districts, and any other information that they have on file, such as OCR's civil rights surveys, and also consults with advocates.[132]

OCR often does not select small school districts for compliance reviews, because, as indicated in the Strategic Plan, OCR wants to have an impact on the greatest number of students possible.[133] However, to ensure that smaller districts are in compliance with civil rights requirements, regional enforcement offices may provide them with technical assistance through conferences and presentations, and they encourage larger school districts to provide training to smaller districts.[134]

In addition to individual school district reviews, OCR conducts statewide reviews, although such reviews have some inherent difficulties. According to one OCR attorney, "The more global you go the harder it is to tackle individual problems in individual school districts [so] the further away you get from the school district, the more you become involved in process and oversight rather than the day-to-day workings of a school."[135] However, OCR often chooses issues and cites so as to have a statewide impact.[136] The Atlanta Enforcement Office ensures that all reviews within a particular State focus on the same issue, so that the office can negotiate statewide remedies.[137]

Once a regional enforcement office has selected issues and districts for review, it places them in its proposed enforcement docket, which is sent to headquarters for review and approval. Each proposed review is justified with anecdotal and statistical information.[138] In 1986 and 1987 OCR issued policy guidance for the selection of sites for compliance reviews based on the *Adams* court order.[139] However, this document no longer represents OCR's current policy and is considered a historical policy. To date, OCR has not provided any formal guidance to its regional staff establish-

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131 Jim Littlejohn, Enforcement Director, Kansas City Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, July 2, 1996, p. 1 (hereafter cited as Littlejohn interview).

132 Archie B. Meyer, Enforcement Director, Atlanta Enforcement Office, U.S. Department of Education, interview in Atlanta, GA, June 18, 1996, p. 1 (hereafter cited as Meyer interview).

133 *See* Sherry Goldbecker, Issue Contact Person for Mathematics and Science, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., May 30, 1996, p. 7 (hereafter cited as Goldbecker interview); Martinez interview, p. 6.

134 *See* Martinez interview, p. 2.

135 Steve Pereira, Chief Civil Rights Attorney, New York Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 20, 1996, p. 8 (hereafter cited as Pereira interview).

136 *See* Taylor August, Enforcement Director, Dallas Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 26, 1996, p. 4; Lewis interview, p. 6.

137 Meyer interview, p. 1.

138 *See* Littlejohn interview, p. 2.

139 At the time of the U.S. Department of Education's creation in 1980, OCR remained under a 1977 court order issued by the U.S. District Court for the District of Columbia in the case of *Adams v. Califano*. 430 F. Supp. 118, 121 (D.D.C. 1977). The longstanding *Adams* litigation began in 1970 when the NAACP Legal Defense and Educational Fund filed a class action suit against the U.S. Department of Health, Education, and Welfare's Office for Civil Rights. The *Adams* plaintiffs, mainly students attending public schools and their parents, alleged that OCR had failed to enforce Title VI in 17 Southern and border States. In a series of court orders issued in the *Adams* case between 1973 and 1977, the court sought to guide OCR's implementation, compliance, and enforcement activities toward the implementation of more stringent enforcement procedures. OCR remained under the court orders imposed by the *Adams* litigation through most of the 1980s. On June 26, 1990, the U.S. Court of Appeals for the District of Columbia denied the plaintiff's claim of a private right of action against DOEd, thus ending the litigation's 20-year history and removing all court-imposed obligations from OCR. Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990). For a further discussion of the *Adams* litigation, see U.S. Commission on Civil Rights, *Equal Educational Opportunity Project Series: Volume I* (December 1996), p. 169.

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ing OCR's current priorities for compliance review site selection.

OCR's Partnership Process

OCR uses an innovative "partnership process" to resolve both complaints and compliance reviews. Under this approach, when OCR receives a complaint relating to a school district, OCR notifies the school district of the complaint and gives the district an opportunity to work together with OCR to resolve the complaint.[140] According to the program manager in OCR's Philadelphia Enforcement Office, school districts generally respond by calling OCR and saying "we want to resolve this."[141] A similar process occurs in the case of a compliance review.[142]

Assistant Secretary Cantú has contrasted OCR's partnership approach with its traditional hands off approach to compliance reviews as follows:

> [W]e are moving away from the traditional approach where we used to go on-site to collect extensive data and worked almost independently until we arrived at compliance findings, sometimes years later, and often in a confrontational posture. Now we are striving for a partnership approach that recognizes that Federal, state, and local education agencies, as well as parents and other interested parties, share a common goal of providing equal opportunity and access to high quality education for all students. Under this approach, we combine our expertise with these partners and stakeholders to come up with effective solutions. Sometimes this may lead to working with State officials in developing state-wide strategies to address identified civil rights concerns.[143]

Assistant Secretary Cantú emphasized the value of partnerships in fashioning educationally sound remedies:

> We are also asking our partners to share in educationally sound remedies when discrimination is identified. I believe this is essential if we are to help bring about positive change, impact on students' lives, and provide tangible assistance to the greatest number of potentially affected students. We want remedial action that makes injured parties whole again, that lessens the chance of future violations, and that sets a clear precedent for other parties.[144]

Although no formal guidance from OCR headquarters exists on the partnership process—the word "partnership" is not even mentioned in OCR's Case Resolution Manual—several regional offices are experimenting with the partnership approach.[145] One of OCR's senior enforcement directors explained that the partnership approach arose out of innovations made independently within many of the regional offices and as a result the approach may differ from region to region. The Seattle Enforcement Office calls the approach "partnership," and the Kansas City Enforcement Office calls it "profile assessment and resolution reviews (PAR)."[146] The head of the Kansas City Enforcement Office explained, "We are not focusing on making a finding of violation. We are interested in working with the school and the State in partnership, to identify areas that need to be strengthened. . . . My approach with PAR [reviews] is to give schools information about expectations that OCR would have [for what constitutes] full compliance with equal educational opportunity [requirements]. I think, the more in-

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140 *See* Lewis interview, p. 7.

141 Wolff interview, pp. 4–5.

142 *See* "Inside the Education Department: Cantú Hopes OCR's Bark Will Prevent Bite from Justice," *Education Daily Special Supplement*, vol. 29, no. 128 (July 3, 1996), pp. 1–2.

143 Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, Remarks at the 2nd Annual Civil Rights summit, Kansas City, MO, Sept. 8, 1995, p. 8 (hereafter cited as Cantú remarks).

144 Cantú Remarks, p. 10.

145 *See* Lewis interview, pp. 11–12.

146 Lewis interview, pp. 11–12.

formation we can provide, the better."[147] The Dallas Enforcement Office also conducts PAR reviews following the Kansas City model.[148]

The Chicago office conducted a *Lau* review in Michigan that demonstrates the use of the partnership approach. Chicago office staff reviewed eight districts in suburban Detroit.[149] They approached all the districts, got them together, and told them that they would send a data request, collect data, and conduct interviews. They explained that they would let the districts know what their preliminary findings were and would give them a chance to enter into an agreement at that stage. Seven of the districts ended up entering into agreements after OCR told them of the preliminary findings; one did not. The office conducted further investigation of that district. It has made a preliminary conclusion that the district is not in compliance, but a final determination has not yet been issued. The Chicago office will provide that school district with another opportunity to enter into an agreement before taking steps to make a final determination on compliance.[150]

The New York enforcement director stated that the partnership idea is "working very well in serving the kids," but that it would take more experience with the approach for OCR to be able to assess its overall effectiveness.[151] She cited the New York Enforcement Office's compliance review of Tarrytown, New York, as a good example of the partnership approach.[152] In that review, OCR was concerned about the disproportionate referral of minorities to special education. OCR entered into a partnership with the school district, and the school district signed a resolution agreement with OCR.[153] As a result, "there has been a reduction in disproportionate referrals."[154] OCR continues to monitor the implementation of the resolution agreement in that case.[155]

The Kansas City Enforcement Office has formalized its partnership process in documents that explain clearly the partnership approach as well as documents implementing the approach for high-priority issue areas.[156] The Kansas City Enforcement Office has issued a document that describes the approach the office takes to PAR reviews.[157] The document indicates that the PAR reviews are intended to replace OCR's traditional compliance review process with a streamlined approach that "recognizes that Federal, state, and local education agencies, as well as parents and other interested parties share a common goal of

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147 Littlejohn, pp. 9, 11.

148 Bates interview, p. 8.

149 Linda McGovern, Enforcement Coordinator, Division C, and Enforcement Director, Chicago Enforcement Office, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, June 26, 1996, p. 3.

150 Ibid.

151 Whitney interview, p. 7.

152 Ibid., p. 7.

153 Resolution Agreement, Union Free School District of the Tarrytowns, Case No. 02–93–5005, attachment to Helen N. Whitney, Regional Director, Office for Civil Rights, Region II, U.S. Department of Education, letter to Donald R. Kusel, July 24, 1995, submitted as part of DOEd/OCR/New York Response to USCCR's June 6, 1996 letter.

154 Ibid., p. 8.

155 Ibid.

156 These documents are not available through OCR's Electronic Library.

157 U.S. Department of Education, Office for Civil Rights, Region VII–Kansas City, MO, "Profile Assessment, and Resolution Reviews: Partnership Approaches to Civil Rights Compliance—a Region VII Pilot Program," submitted as part of DOEd/OCR/Region VII response to USCCR's June 16, 1996 letter requesting information (hereafter cited as OCR, Kansas City Enforcement Office, "PAR Reviews").

providing equal opportunity and access to high-quality education for all students."[158] The document states that in conducting PAR reviews, "OCR seeks to combine its expertise with that of state and local school officials, parents, and other community members to reach effective solutions to high-priority civil rights issues."[159] A key feature of a PAR review is that it involves providing school districts with "self-assessment guides" for high priority issues. School districts can complete the self-assessments quickly as OCR conducts focus group discussions (as opposed to individual interviews) with school district staff as well as with parents and community members.[160] Based on the self-assessments and the focus group discussions, OCR can provide immediate feedback and recommendations to school district officials.[161] The recommendations ultimately are incorporated into a resolution agreement. The PAR review process also entails working with State education agency officials to develop statewide strategies and with parents and community members to learn their concerns and facilitate dialogue.[162]

The Kansas City Enforcement Office also developed issue-specific data requests to school districts,[163] issue guidance,[164] and self-assessment guides[165] to be used in PAR reviews for several high-priority issues, including limited English proficiency, overrepresentation of minorities in special education, and equal educational opportunity for minority students in advanced education programs. For each issue area, the data request requests basic statistical and procedural information from the school district.[166] The issue guidance provides the school district with basic information on what is necessary for the school district to be in compliance. For instance, the issue guidance document for limited English proficiency provides a brief statement of school districts' obligation to take affirmative steps to "rectify the language deficiencies of national origin minority

158 Ibid., p. 1.

159 Ibid.

160 Ibid., p. 2.

161 Ibid., p. 2.

162 Ibid., pp. 2–3.

163 *See* U.S. Department of Education, Office for Civil Rights, Kansas City Enforcement Office, "Profile Data Request: Equal Educational Opportunities for Limited-English-Proficient Students" (hereafter cited as OCR, Kansas City, "LEP Data Request"); "Profile Data Request: Minorities and Special Education" (hereafter cited as OCR/Kansas City, "Minorities and Special Education Data Request"); and "Profile Data Request: Equal Educational Opportunities for Minorities in Advanced Education Programs" (hereafter cited as OCR/Kansas City, "Minorities in Advanced Education Programs Data Request"), submitted as part of DOEd/OCR/Region VII Response to USCCR's June 26, 1996 letter.

164 *See* U.S. Department of Education, Office for Civil Rights, Kansas City Enforcement Office, "PAR Issue Brochure: Educational Services for Limited-English-Proficient Students" (hereafter cited as OCR, Kansas City, "LEP Guidance"); "Issue: Minorities and Special Education" (hereafter cited as OCR/Kansas City, "Minorities and Special Education Guidance"); and "Equal Educational Opportunities for Minorities in Advanced Education Programs" (hereafter cited as OCR/Kansas City, "Minorities in Advanced Education Programs Guidance"), submitted as part of DOEd/OCR/Region VII Response to USCCR's June 26, 1996 letter.

165 *See* U.S. Department of Education, Office for Civil Rights, Kansas City Enforcement Office, "Equal Educational Opportunities for Limited-English-Proficient Students: District Assessment Guide" (hereafter cited as OCR, Kansas City, "LEP Self-Assessment Guide"); "Minorities and Special Education: District Self-Assessment Guide" (hereafter cited as OCR/Kansas City, "Minorities and Special Education Self-Assessment Guide"); and "Equal Educational Opportunities for Minorities in Advanced Education Programs: District Assessment Guide" (hereafter cited as OCR/Kansas City, "Minorities in Advanced Education Programs Self-Assessment Guide"), submitted as part of DOEd/OCR/Region VII Response to USCCR's June 26, 1996 letter.

166 *See* OCR, Kansas City, "LEP Data Request;" OCR, Kansas City, "Minorities in Special Education Data Request;" and OCR, Kansas City, "Minority Students in Advanced Education Programs Data Request."

students where inability to speak and understand the English language prevents such students from effective participation in the district's program."[167] It then outlines OCR's approach to applying legal standards in assessing a school district's education programs for students with limited English proficiency in the following areas:[168] identification,[169] assessment,[170] alternative language services,[171] program participation,[172] staffing,[173] instructional materials and resources,[174] exit criteria,[175] program evaluation,[176] parental notice,[177] segregation and facilities,[178] special opportunity programs,[179] and special education for students with limited English proficiency.[180] An appendix to the document summarizes statutes and policies related to students with limited English proficiency[181]

The self-assessment guides ask districts to rate themselves on scales of one to five and to answer "yes, no" questions related to the issue area. For instance, the self-assessment guide related to overrepresentation of minorities in special education asks school districts to ascertain whether or not there is a disproportionate enrollment of minorities in various special education programs.[182] Then it asks a series of questions related to prereferral intervention,[183] referral,[184] evaluation,[185] placement,[186] and procedural safeguards.[187]

According to Assistant Secretary Cantú, OCR's partnership approach has achieved positive results. OCR has accomplished a speedier resolution of cases with fewer staff. For example, in 1993, OCR had 854 FTEs and took 131 days to complete a complaint; in 1995, OCR had only 788 FTEs but averaged 119 days for complaints. Assistant Secretary Cantú noted that the change "has not been easy;" the new partnership approach has meant a culture change from the tra-

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167 OCR, Kansas City, "LEP Guidance," p. 2.

168 For a further discussion of these areas, *see* the forthcoming volume 3 of the Equal Educational Opportunity Project Series.

169 Ibid., p. 3.

170 Ibid., pp. 3–4.

171 Ibid., p. 4.

172 Ibid., pp. 4–5.

173 Ibid., p. 5.

174 Ibid., pp. 5–6.

175 Ibid., p. 6.

176 Ibid., pp. 6–7.

177 Ibid., p. 7.

178 Ibid., pp. 7–8.

179 Ibid., p. 8.

180 Ibid., p. 8.

181 Ibid., appendix.

182 OCR, Kansas City, "Minorities in Special Education Self-Assessment Guide," pp. 1–2.

183 Ibid., pp. 2–3.

184 Ibid., pp. 4–5.

185 Ibid., pp. 5–10.

186 Ibid., pp. 10–11.

187 Ibid., pp. 11–13.

ditional "hands off" approach. With the partnership approach, OCR has worked under the assumption that "everyone wants the same thing, namely, an end to discrimination. . . . Although [OCR is] prepared to do the traditional investigations, [it is] trying to work with the school districts in pursuit of this common goal."[188] Despite these changes, OCR has not issued formal guidance explaining the partnership approach or formalizing the Kansas City pilot program.

Promising Practices and Models that Work

In fulfillment of OCR's Strategic Plan's aim to develop "strong remedial models" and disseminate "models that work," over the past year, OCR has adopted the innovative practice of putting together issue area teams to research and develop "promising programs and practices" documents in its high-priority areas. The promising practices documents generally are prepared by teams of issue-area experts, comprised of regional and headquarters staff. When completed, the final written product is distributed by OCR's headquarters office to each of the regional enforcement offices. OCR's headquarters serves as the "clearinghouse" on this information.[189]

The promising practices documents describe educationally valid models that have been implemented in school districts across the country and promote equal educational opportunity in the issue areas. However, OCR does not make determinations on educational validity because it does not consider itself an expert on education issues.[190] Instead, OCR relies on external education experts and consultants for information on the validity of education practices.

OCR's promising practices documents are designed for school districts as part of OCR's technical assistance efforts as well as for OCR staff to use as guides in developing remedial plans for school districts that are not in compliance with civil rights statutes. Promising practices or models that work are useful ways for OCR to provide districts with information on educationally sound programs and what it takes to implement them.[191]

In March 1996, OCR released a promising practices document relating to equal educational opportunity for students with limited English proficiency.[192] The document describes a number of educational programs that may help schools ensure effective participation by limited English proficient students in their regular education programs. For each education program, the document indicates the targeted population, provides a brief summary description, offers evidence of the program's success, and gives the names of contact persons familiar with the program.[193]

Federal Policy Promoting Equal Educational Opportunity

Three salient themes resonate throughout Federal policy affecting education: 1) the promotion of equal access to education programs through education funding statutes such as Title I[194] and Title VII of the Improving America's Schools Act;[195] 2) the promotion of high standards of excellence

188 Cantú interview, p. 5.

189 *See* Lee Nell, Chief Regional Attorney, Philadelphia Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, p. 19 (hereafter cited as Nell interview).

190 *See* Cantú interview, p. 6; Susan Bowers, Senior Enforcement Director, and former issue contact person on testing issues, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 5.

191 Lewis interview, p. 5.

192 Office for Civil Rights, U.S. Department of Education, *Promising Practices and Programs for Serving National Origin Limited English Proficient Students*, prepared by *Lau* Team, March 1996, submitted as part of DOEd/OCR/Philadelphia response to USCCR June 6, 1996 letter (hereafter cited as OCR, *Lau Promising Practices*).

193 Ibid.

194 20 U.S.C. § 6301 et seq. (1994).

through Goals 2000: Educate America Act;[196] and 3) the promotion of equal educational opportunity through civil rights enforcement statutes such as Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974. Through a review of law, policy, and research literature, the Commission has identified five principles whose effective implementation researchers and policymakers have considered essential in the development of instructional programs that reflect these themes and the goals they represent and, in turn, meeting the educational needs of students with limited English proficiency. These principles are:

1) providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents in their children's education;
2) utilizing neutral and nondiscriminatory diagnostic and screening procedures when placing students in education programs;
3) structuring educational programs designed to serve a diverse student population by maintaining a primary objective to place students in regular classes to the greatest extent possible; grouping students to reflect differential ability in various subjects; reevaluating and regrouping students periodically to reflect both the differential ability in various subjects and changes in achievement, performance, and development;
4) evaluating and allocating teachers, facilities, and other resources among education programs; and
5) undertaking individualized and institutional efforts to eliminate all barriers; provide equal access to all subjects, activities, and career opportunities; and ensure that each student maximize his or her potential opportunities.

The importance of incorporating the five principles in the development of such programs derives from their presence in congressional and Department of Education policies and in the work of education researchers.[197] The principles reflect congressional policy in the Bilingual Education Act, the Improving America's Schools Act, and OCR and program office policy. The principles represent an intersection of civil rights laws, education program policy, and educational research perspectives. For example, the Bilingual Education Act, like the principles, explicitly identifies this intersection between civil rights laws and education policy. The act states as part of its "findings, policy, and purpose," that:

[T]he Federal Government, as exemplified by Title VI of the Civil Rights Act of 1964 and section 204(f) of the equal educational opportunity Act of 1974, has a special and continuing obligation to ensure that States and local school districts take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency, and (16) the Federal

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195 20 U.S.C. §§ 7401–7602 (1994).

196 20 U.S.C. § 5801 et seq. (1994).

197 For example, the National Center for Research on Cultural Diversity and Second Language Learning, a premier research organization on the development of second language proficiency based at the University of California, Santa Cruz, and funded by the Office of Educational Research and Improvement of the U.S. Department of Education incorporates similar factors as key elements in its mission statement. The Center has recently described its mission in the following way: "The Center is committed to promoting the intellectual development, literacy, and thoughtful citizenship of language minority students and to increasing appreciation of the cultural and linguistic diversity of the American people. Center researchers from a variety of disciplines are conducting studies across the country with participants from a wide range of language minority groups in pre-kindergarten through Grade 12 classrooms. Research projects deal with the relationship between cultural and linguistic factors in the achievement of literacy; teaching strategies to help children from diverse linguistic and cultural backgrounds to gain access to content material; alternate models of assessment for language minority students; various instructional models for language minority children; and the effect of modifications in the social organization of schools on the academic performance of students from diverse backgrounds." Donna Christian, *Two-Way Bilingual Education: Students Learning Through Two Languages* (Santa Cruz, CA: National Center for Research on Cultural Diversity and Second Language Learning, 1994), p. i.

Government also, as exemplified by the Federal Government's efforts under this title, has a special and continuing obligation to assist States and local school districts in developing the capacity to provide programs of instruction that offer limited English proficient children and youth an equal educational opportunity.[198]

Educational agencies have a legal responsibility to provide programs that produce higher levels of academic performance for students with limited English proficiency. The Federal courts have fashioned legal standards for compliance with Title VI and the Equal Educational Opportunities Act that use student academic performance as the ultimate criterion in judging whether an educational agency is fulfilling its legal responsibilities to students with limited English proficiency. The issues now revolve around the development of programs that will provide students with the equality of educational opportunity promoted in Federal education funding statutes and contemplated in Federal civil rights statutes and their implementing regulations. For example, like the principles, programs funded under the Bilingual Education Act require procedures for the identification, assessment, placement, and evaluation of student participants in programs funded under the act. The act also includes provisions relating to and programs designed to promote parental involvement and teacher qualifications. Finally, the statute, like the principles, is generally based on the objective of providing access to programs for students with limited English proficiency.

The Bilingual Education Act and the five principles share the same objectives as those contemplated in the Federal civil rights laws: Titles IV[199] and VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974. In enacting the Equal Educational Opportunities Act, Congress sought to identify a civil rights remedial scheme that did not use the court-sanctioned practice of busing. Instead, Congress focused on another form of school district action, the development and implementation of the educational program itself, as a means of addressing civil rights violations. Congress explicitly stated in section 1703(b) of the Equal Educational Opportunities Act that it sought through the passage of the act to "specify appropriate remedies for the elimination of the vestiges of dual school systems."[200]

Federal legislation and policymaking have favored meaningful access to regular education programs for students with limited English proficiency. For example, Congress enacted the Equal Educational Opportunities Act to encourage the development of education programs designed to address and eliminate the language barriers preventing meaningful access to the regular educational program for students with limited English proficiency. Likewise, in its policy addressing the Supreme Court ruling in *Lau v. Nichols*,[201] the U.S. Department of Education has sought to encourage school systems to integrate students with limited English proficiency into regular education classes.[202]

The five principles also are supported by the fifth circuit decision in *Castaneda*. In *Castaneda*, the fifth circuit identified specific areas of importance for school districts in developing and implementing educational programs for students with limited English proficiency. In using the *Castaneda* standard to evaluate school districts' program development and implementation to ensure equal participation, the Federal courts and OCR can employ numerous criteria. Among these criteria are the five principles: school districts' efforts in providing qualified teachers and equal access to facilities and other resources;[203] paren-

198 20 U.S.C. § 7402(a)(15)–(16) (1994).

199 Pub. L. No. 88–352, 78 Stat. 246 (codified as amended at 42 U.S.C. §§ 2000c–9 (1994)).

200 20 U.S.C. § 1703(b) (1994).

201 414 U.S. 563 (1974).

202 September 1991 policy memorandum, p. 10.

203 Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989); People Who Care v. Rockford Bd. of Educ., 851

tal notification and involvement;[204] nondiscriminatory and neutral screening and diagnostic procedures;[205] education programs with the least segregative effects for students who are limited English proficient;[206] and institutional efforts to eliminate barriers and promoting equal access to all subjects, activities, and career opportunities.[207] In addition, the three-pronged legal standard established by the *Castaneda* court reflects both educational research and civil rights theories. This standard therefore provides an effective means from both an educational and a civil rights perspective, for implementing a broadly written legislative requirement. As such, this standard provides an appropriate analytical basis for OCR's inquiry in conducting its civil rights enforcement activities.

If a school system follows *Castaneda* and implements each one of the five principles properly when developing a program, then that program most likely will be effective in promoting equal access and educational opportunity. The five principles appear to embody the "appropriate action" and "affirmative steps" required under Federal civil rights laws. In focusing on the five principles when developing and implementing educational programs, school districts are likely to provide the "effective participation" and "meaningful access" required under Federal civil rights laws. In turn, successful civil rights enforcement based on equal educational opportunity, whether as a remedial

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F. Supp. 905 (N.D. Ill. 1994), *subsequent appeal*, 68 F.3d 172 (7th Cir. 1995), *summ. judgment denied*, 1996 U.S. Dist. LEXIS 9530 (N.D. Ill. Jan. 26, 1996), *remanded*, 90 F.3d 1307 (7th Cir. 1996), *and aff'd in part, rev'd in part, remanded*, 1997 U.S. App. LEXIS 7143 (7th Cir. Apr. 15, 1997).

204 Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989); Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Nat Lommori, Superintendent, Lyon County School District, Yerington, NV, re: Case No. 10–94–5005, July 17, 1995; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to John E. Bierwirth, Superintendent, Portland School District, Portland, OR, re: Case No. 10–94–5004, Dec. 27, 1994; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Steve Wisely, Superintendent, Medford School District, Medford, OR, re: Case No. 10–94–5002, Oct. 28, 1994.

205 Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989); Gomez v. Illinois, 811 F.2d 1030 (7th Cir. 1987); Aspira of New York, Inc. v. Board of Educ., 394 F. Supp. 1161 (S.D.N.Y. 1975); Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Otis Falls, Superintendent, North Franklin School District, Connell, WA, re: Case No. 10–94–5010, Mar. 13, 1996; M. Arnold Chavez, Regional Director, Region VIII, Office for Civil Rights, U.S. Department of Education, to Steven H. Peterson, Superintendent, Washington County School District, St. George, UT, re: Case No. 08–94–5022, Nov. 8, 1995; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Pam Carnahan, Superintendent, Sedro Woolley School District, Sedro Woolley, WA, re: Case No. 10–93–5003, Oct. 1, 1993; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Jim B. Hensley, Superintendent, Kansas City Unified School District #500, Kansas City, KS, re: Case No. 07–92–5004, July 29, 1993.

206 Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Otis Falls, Superintendent, North Franklin School District, Connell, WA, re: Case No. 10–94–5010, Mar. 13, 1996; M. Arnold Chavez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Steven H. Peterson, Superintendent, Washington County School District, St. George, UT, re: Case No. 08–94–5022, Nov. 8, 1995; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to George Murdock, Superintendent, Pasco School District No. 1, Pasco, WA, re: Case No. 10–93–5001, Sept. 24, 1993; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Janice Myers, Superintendent, Muscatine Community School District, Muscatine, IA, re: Case No. 07–93–5003, July 14, 1993; M. Arnold Chavez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Richard E. Kendell, Superintendent, Davis County School District, Farmington, UT, re: Case No. 08–95–5011; M. Arnold Chávez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Larry Bussey, Superintendent, Sierra Grande School District R–30, Blanca, CO, re: Case No. 08–95–5013; M. Arnold Chávez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Richard E. Kendell, Superintendent, Davis County School District, Farmington, UT, re: Case No. 08–95–5011.

207 *See* 851 F. Supp. 905.

or prevention scheme, will result when schools meet high standards for quality in implementing of each of the five principles. These principles are key to structuring nondiscriminatory educational programs and advancing equal educational opportunity for all students. Congress incorporated these principles into civil rights laws and program statutes, such as the Individuals with Disabilities Education Act and the Elementary and Secondary Education Act of 1965.[208] Moreover, the U.S. Department of Education included many of the principles in its regulations and policies for section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act for 1964.[209] The Commission views these principles as crucial to ensuring nondiscrimination and promoting equal educational opportunity for all students. Consequently, in developing the Equal Educational Opportunity Project Series, the Commission has studied how the principles can be or already have been addressed in educating students with limited English proficiency.

The Commission seeks to show that these five principles, taken together, represent an effective means for remedying past civil rights violations and providing a proactive plan for preventing future civil rights violations affecting students with limited English proficiency. The five principles offer a model that can provide a foundation on which all schools can build in seeking to deliver equal educational opportunity to both English-proficient students and students with limited English proficiency.

Through a thorough discussion of each principle as it is reflected in education research literature, law, and the Office for Civil Rights policy and enforcement activities, the Commission seeks to create a new and useful perspective on the development and implementation of education programs for students with limited English proficiency. For example, State and local school district officials have viewed the limited English proficiency of students as *problems* to be remedied instead of valuing each student's individuality. The Commission's focus in this report is on the ways in which schools can learn to value students' individual education needs through an emphasis on each principle.

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208 *See* 20 U.S.C. § 1401(20)(C) (1994); 20 U.S.C § 1409(a),(h)(1) (1994); 20 U.S.C. § 1412(a)(5),(7),(11),(12) (1994); 20 U.S.C. § 1413(a)(12),(14) (1994); 20 U.S.C. § 1414(a)(1)(C),(5),(7) (1994); 20 U.S.C. § 1415(a),(b)(1)(A–E),(b)(2) (1994); 20 U.S.C. § 1415(c-d) (1994); 20 U.S.C. § 1431(a)-(c) (1994); 20 U.S.C. § 1432 (1994); 20 U.S.C. § 6301 (1994) (Title I Programs); 20 U.S.C. § 7231 (1994) (Women's Educational Equity Act Program); and 20 U.S.C. § 7400 (1994) (Bilingual Education Programs).

209 *See* 34 C.F.R. pt. 104 (1996); September 1991 policy memorandum.

Chapter 5

Parental Notification and Involvement of Parents

Background

The first step in implementing an effective program for students with limited English proficiency is determining which students should be included in this category. In making this determination, school officials must rely heavily on information obtained through parental notification. Once a student with limited English proficiency has been admitted to a special language program, parent and community involvement and support are crucial elements in fostering the student's successful completion of the program. Policymakers, educators, and scholars share a broad consensus that parental notification and involvement in the development and implementation of education programs facilitates equal educational opportunity and educational objectives such as student achievement. The importance of parental involvement is evident in Federal education program statutes and court decisions.

Bilingual Education Act

Parental involvement and notification find strong support in the provisions of the Bilingual Education Act. The act recognizes the importance of parental involvement through its "Findings, Policy, and Purpose" section and through provisions detailing procedures for local school districts applying for Federal funding. The act states as a finding that "limited English proficient children and youth face a number of challenges in receiving an education that will enable such children and youth to participate fully in American society,"[1] including: ". . . (C) *the limited English of their own parents, which hinders the parents' ability to fully participate in the education of their children.*"[2] The act states further: "[a]n application for a grant under a subpart shall contain the following: "(B) A description of the program to be implemented and how such program's design— (iii) *involves the parents of the children and youth of limited-English proficiency to be served.*"[3]

In addition, the act requires schools or school districts receiving funds awarded under the act provide notification to parents before placing students in a special program designed to develop English proficiency. Specifically, the act requires:

> Parents of children and youth participating in programs assisted under part A *shall be informed of*—
> (A) a student's level of English proficiency, how such level was assessed, the status of a student's academic achievement and the implications of a student's educational strengths and needs for age and grade appropriate academic attainment, promotion, and graduation;
> (B) what programs are available to meet the student's educational strengths and needs and how the programs differ in content and instructional goals, and in the case of a student with a disability, how the program meets the objectives of a student's individualized education program; and
> (C) the instructional goals of the bilingual education or special alternative instructional program, and how the program will specifically help the limited English proficient student acquire English and meet age-appropriate standards for grade-promotion and graduation, including—
> (i) the benefits, nature, and past academic results of the bilingual educational program and of the instructional alternatives; and

1 20 U.S.C. § 7402(a)(5) (1994).

2 20 U.S.C. § 7402(a)(5)(C) (1994) (emphasis added).

3 20 U.S.C. § 7426(g)(1)(B)(iii) (1994) (emphasis added).

(ii) the reasons for the selection of their child as being in need of bilingual education.[4]

Moreover, the act includes a provision that allows parents the "option to decline" their child's participation.[5] The act states that in the event that a parent chooses this option to decline, "[a] local educational agency shall not be relieved of any of its obligations under title VI of the Civil Rights Act of 1964 because parents choose not to enroll their children in bilingual education programs."[6] However, in the case of parents who choose to decline their child's participation in a program funded under the act, the act does not provide any guidelines on how the parents will work with school personnel to resolve any issues relating to the form of language assistance the school will provide in this circumstance. Neither the act nor the Department's General Administrative Regulations,[7] which the Department is using in place of implementing regulations for the act, provides guidance on this issue.

Several of the Bilingual Education Act's provisions relating to awards of grants seek to promote parental involvement. For example, the act authorizes Bilingual Education Capacity and Demonstration grants,[8] under which funds may be used by school districts to implement "family education programs and parent outreach and training activities designed to assist parents to become active participants in the education of their children."[9]

The Bilingual Education Act also includes a provision with general guidelines instructing schools to offer regular meetings between school personnel and parents of students participating in programs funded under the act. The act states that:

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4 20 U.S.C. § 7602(b)(1)(A)–(C) (1994) (emphasis added).

5 20 U.S.C. § 7602(b)(2) (1994) (stating "Such parents shall also be informed that such parents have the option of declining enrollment of their children and youth in such programs and shall be given an opportunity to so decline if such parents so choose.")

6 20 U.S.C. § 7602(b)(2)(B) (1994).

7 34 C.F.R. § 75.210 (1996).

8 Bilingual Education Capacity and Demonstration grants include four different grant programs: Program Development and Implementation grants, Program Enhancement projects, Comprehensive School grants, and Systemwide Improvement grants. 20 U.S.C. subpart 1 (1994). Program Development and Implementation grants are awarded to "develop and implement new comprehensive, coherent, and successful bilingual education or special alternative instructional programs for limited English proficient children. . . ." 20 U.S.C. § 7422(a) (1994). Program Enhancement Projects are grants "to carry out highly focused, innovative, locally designed projects to expand or enhance existing bilingual education or special alternative instructional programs for limited English proficient students." 20 U.S.C. 7423(a) (1994). Comprehensive School grants are grants "to provide financial assistance . . . to implement schoolwide bilingual education programs or special alternative instruction programs for reforming, restructuring, and upgrading all relevant programs and operations, within an individual school, that serve . . . children and youth of limited-English proficiency in schools with significant concentrations of such children and youth." 20 U.S.C. 7434(a) (1994). Systemwide Improvement Grants are grants "to implement districtwide bilingual education programs or special alternative instruction programs to improve, reform, and upgrade relevant programs and operations, within an entire local educational agency, that serve a significant number of children and youth of limited English proficiency in local educational agencies with significant concentrations of such children and youth." 20 U.S.C. 7425(a) (1994).

9 *See* 20 U.S.C. §§ 7422(b)(2)(B)(i), 7423(b)(2)(B)(i), 7424(b)(3)(A), 7425(b)(4)(E) (1994). The term "family education program" is defined as "a bilingual education or special alternative instructional program that—(i) is designed— (I) to help limited English proficient adults and out-of-school youths achieve proficiency in the English language; and (II) to provide instruction on how parents and family members can facilitate the educational achievement of their children; (ii) when feasible, uses instructional programs such as the models developed under the Even Start Literacy Programs, which promote adult literacy and train parents to support the educational growth of their children and the Parents as Teachers Program and the Home Instruction Programs for Preschool Youngster; and (iii) gives preference to participation by parents and immediate family members of children attending school." 20 U.S.C. § 7601(6)(A)(i)–(iii) (1994).

Such parents shall receive, in a manner and form understandable to such parents, including, if necessary and to the extent feasible, in the native language of such parents, the information required by this subsection. At a minimum, such parents shall receive—

(A) timely information about projects funded under Part A; and

(B) if the parents of participating children so desire, notice of opportunities for regular meetings for the purpose of formulating and responding to recommendations from such parents.[10]

Title I of the Elementary and Secondary Education Act

Although not targeted specifically to students with limited English proficiency, Title I of the Elementary and Secondary Education Act provides funding for many students with limited English proficiency. Like the Bilingual Education Act, Title I requires school districts receiving funds under the act to involve parents in the development of education programs. For example, Title I of the Elementary and Secondary Education Act states: "[a] local educational agency may receive funds under this part only if such agency implements programs, activities, and procedures for the involvement of parents in programs assisted under this part consistent with the provisions of this section. Such activities shall be planned and implemented with *meaningful consultation with parents of participating children*."[11] Title I also includes a section entitled "School Parental Involvement Policy" that provides "[e]ach school served under this part shall jointly develop with, and distribute to, parents of participating children a written parental involvement policy, agreed upon by such parents, that shall describe the means for carrying out the requirements of subsections (c) through (f). Such policy shall be updated periodically to meet the changing needs of parents and the school."[12] The section further provides: "[e]ach school served under this part shall—(1) convene an annual meeting, at a convenient time, to which all parents of participating children shall be invited and encouraged to attend, to inform parents of their school's participation under this part and to explain this part, its requirements, and their right to be involved. . ."[13] Finally, the "Even Start Family Literacy Program,"[14] which is Part B of Title I, attempts to improve students' education by involving parents in their children's education programs. Congress has stated the purpose of the program is: "to help break the cycle of poverty and illiteracy by improving the educational opportunities of the Nation's low income families by integrating early childhood education, adult literacy or adult basic education, and parenting education into a unified family literacy program. . ."[15]

Federal Courts

The courts have presided over numerous cases involving parents of students with limited English proficiency bringing suit to ensure their children's rights.[16] In one example involving litigation on behalf of students having limited English proficiency, a court has looked favorably at school district practices imbued with strong parental involvement. In the California case of *Teresa P. v. Berkeley Unified School District*,[17] the court, in its findings of fact, provided detailed

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10 20 U.S.C. § 7602(b)(3)(A)–(B) (1994) (emphasis added).

11 20 U.S.C. § 6319(a)(1) (1994).

12 20 U.S.C. § 6319(b)(1) (1994).

13 20 U.S.C. § 6319(c)(1) (1994).

14 20 U.S.C. §§ 6361–6370 (1994).

15 20 U.S.C. § 6361 (1994).

16 *See e.g.*, Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989); Aspira of New York, Inc. v. Board of Educ., 394 F. Supp. 1161 (S.D.N.Y. 1975).

17 724 F. Supp. 698 (N.D. Cal. 1989).

examples of parental satisfaction with the school district program. To the school district's credit, the court found that parents of students with limited English proficiency were heavily involved in the development of the school district's education program for these students. The district convened a series of Bilingual District Advisory Committee Meetings for parents of these students. The district's master plan calling for both bilingual and ESL programs was approved by a majority of the committee's parents.

This case shows a school district program with a significant degree of parental involvement in the design and implementation of the program. The courts' acceptance of the school districts' programs stemmed largely from the quality of the program. One of the reasons for the high quality of the program was the proven efforts to promote parental involvement in the development and implementation of the school district's programs. The district's school-parent relationship helped to persuade the court of the school district's commitment to equal educational opportunity.

Parental participation can have a significant impact in school districts attempting to comply with legal obligations under civil rights laws. For example, in reviewing the success of desegregation strategies, informal indices of improvement may include increased parental participation.[18] In addition, an increased level of parental involvement may also help to offset the problems associated with the lack of consensus over program objectives and effectiveness.[19]

Parental Involvement in the Development and Implementation of Education Programs

Parents who themselves are limited or non-English proficient sometimes are involved less in their children's education than parents whose first language is English due to language barriers. As a result of these language barriers, many parents cannot communicate easily with school officials, such as teachers and administrators. In the context of developing education programs for students with limited English proficiency, the relationship between parents and schools varies greatly across school districts. The strength of this relationship is important in developing educationally effective programs. However, in many school districts across the country the school-parent relationship is tenuous. Many school officials do not appear concerned with involving parents of students with limited English proficiency in the development of education programs for such students.[20] As a result, parents often are dissatisfied

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18 M. Beatriz Arias, "Mexican American Student Desegregation and Desegregation in California," in Raymond V. Padilla and Alfredo H. Benavides, eds., *Critical Perspectives on Bilingual Education Research* (Tempe, AZ: Bilingual Press, 1992) p. 419. Arias notes that "[f]or language minority students, especially Mexican American students, informal indices that are relevant include access to instructional programs that provide either English as a Second Language (ESL) or bilingual curriculum. Increased parental participation is also an important educational objective for Mexican American students." Ibid.

19 One commentator has concluded that:
"In the face of substantial uncertainty regarding program objectives and effectiveness, . . . the Federal government should attempt to guarantee that state and local decisionmakers deal fairly with conflicts about program objectives. Federal policymakers can accomplish this task by establishing procedural rules that ensure that parents and community representatives have access to state and local decisionmaking processes and by providing for independent review of these parents' or representatives' complaints about exclusion. . . . To further guarantee procedural fairness, the Federal government could require broader consultation with affected community groups as well as parental advisory councils, develop more specific guidelines about the consultative process, and create a mechanism to review the adequacy of parental and community involvement. These measures would ensure that state and local decisionmakers fully consider competing values in formulating programs for NEP and LEP students." Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 Cal. L. Rev. 1249, 1337 (1988) (hereafter cited as Moran, *The Politics of Discretion*).

20 In 1996, the National Association of Elementary School Principals conducted a survey asking 802 school principals to rank their concerns about their schools. The survey asked school principles to rate the importance of 24 school issues as "very important," "important," or "less important." One of the issues was the importance the principals attached to educating children and families who do not speak English. The survey showed that only 20 percent of the principals surveyed rated

with the programs once they are implemented. The problem is compounded by school officials who have resisted parental demands to change the program or their child's placement.

Some educational research suggests parents of students with limited English proficiency may have poorer relationships with school officials than other parents. A recent U.S. Department of Education (DOEd) report compared families who are Hispanic and those who are white and thus did not specifically address the differences between families of students with limited English proficiency and those of English proficient children. Nevertheless, the study is suggestive in that it indicates that although levels of parental involvement in their children's education are quite similar for the two groups,[21] there are marked differences in the relationship between school personnel and parents across the two groups.[22] For example, although parents of both Hispanic and white 12th grade students in the study were equally likely to be contacted by school personnel regarding the academic performance of their children, parents of Hispanic students were substantially less likely to be asked to volunteer at school than white parents.[23]

Nowhere is the debate of whether bilingual or monolingual education programs are the best means of increasing academic success of students with limited English proficiency more evident than among the parents of these students. The court's findings of fact in the California case of *Teresa P. v. Berkeley Unified School District*,[24] for example, cited survey data indicating that overall in that school district, Asian American parents and other non-Hispanic minority parents preferred the ESL program by a margin of two to one, whereas the surveyed Hispanic parents preferred the bilingual program by the same margin.[25] Fifty-four percent of the parents of Berkeley's students with limited English proficiency in grades one through six reported being "very satisfied" and another 33 percent were "satisfied."[26] Only 11 percent were either "somewhat dissatisfied" or "very dissatisfied" and 2 percent were "not sure."[27] In contrast, however, Hispanic parents in Los Angeles recently protested bilingual education policies outside of the city's Ninth Street

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this issue as "very important." Of the remainder, 32 percent rated it as "important," and 48 percent rated it as "less important." However, when asked to rank the importance of finding ways to help parents become more committed to—and involved with—their children's education, 65 percent of principals ranked this issue as "very important." News release from the National Association of Elementary School Principals, Alexandria, VA, Mar. 22 1996, p. 3.

21 U.S. Department of Education, Office of Educational Research and Improvement, *The Educational Progress of Hispanic Students* (Washington, D.C.: National Center for Education Statistics, September 1995), pp. 9–10. DOEd notes that "[t]he degree to which parents are involved in their children's education is also crucial to effective schooling. Although the vast majority of eighth-grade students reported in 1988 that they talked to their parents about school, Hispanic eighth-graders were slightly less likely than their white peers to talk with their parents about selecting classes, school activities, or class studies. Similar percentages of Hispanic and white students had parents who checked their homework and limited their going out with friends. Hispanic eighth-graders, were more likely than their white counterparts to report that their parents had limited their television viewing and that their parents had visited their classes." Ibid.

22 Ibid., p. 10.

23 Ibid. DOEd reports that 56 percent of Hispanic parents and 53 percent of white parents are contacted by school personnel regarding their child's performance; only 39 percent of Hispanic parents were asked by school personnel to volunteer, while 59 percent of white parents were asked to volunteer. Ibid.

24 724 F. Supp. 698 (N.D. Cal. 1989).

25 724 F. Supp. at 711.

26 *Id.*

27 *Id.*

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School.[28] These parents were dissatisfied with the school's bilingual program, which they perceived as failing to provide their children with adequate education in either language.[29]

School districts across the country are experiencing serious tensions between school officials and parents over placement. Many parents of students with limited English proficiency are expressing dissatisfaction with the education their children are receiving.[30] For example, in New York City, Maria Perez, a parent who is fighting her child's placement in the city's bilingual education program recently stated: "[w]hat bothered me was that they place children in bilingual programs and keep them there for years and years. They aren't learning English."[31] This concern stems from the parent's desire for her child to succeed academically. The problems that prevent academic success can and should be addressed by parents working together with school personnel to determine where the problems exist and how they can be solved.[32]

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28 "Hispanic Parents Battling to Stop Bilingual Classes," *Washington Times*, , Feb. 18, 1996, p. A5. More than 70 parents, many of them workers in the garment industry, had pulled their children out of the school in a boycott of the school's bilingual education program. The parents were demanding instruction in English for their children. One parent was quoted as saying: "They [the children] have to speak read and write English to have success in this country. In the bilingual program, they don't learn either language well." The boycotting parents are taking their children to Las Familias del Pueblo, a community agency serving the Hispanic community since the early 1980s. There the students learn in an English only setting. Alice Callaghan, the agency's director, says school district officials and Ninth Street principal Eleanor Vargas have resisted parents' efforts to transfer children from bilingual programs to English Language Development Program classes. Ms. Callaghan was quoted as saying that "There is no dialogue; they only want to tell the parents that what they are doing is right. The parents see the failure of their children year after year. They do not want their children working in sweatshops. They know their children have no future if they do not speak English." Linda Chavez was quoted as saying in regard to the episode that "What's finally happening is that parents realize that school administrators and bilingual coordinators don't know what is best for their kids." Ibid.

29 OCR's experience, however, is that most parents who have concerns are not concerned about their children being in bilingual education programs, but instead are concerned about whether the programs are being implemented correctly.

30 Gary M. Stern, "Immigrant Parents Challenge Bilingual Education," *Hispanic Outlook*, vol. 6, no. 9 (Jan. 5, 1996), pp. 6–8; "Parents Worry Bilingual Education Hurts Students," *Education Week*, vol. 15, no. 23 (Feb. 28, 1996), p. 1, pp. 10–11; "Hispanic Parents Battling to Stop Bilingual Classes," *Washington Times*, Feb. 18, 1996, p. A5.

31 "Immigrant Parents Challenge Bilingual Education," *Hispanic Outlook*, vol. 6, no. 9 (Jan. 5, 1996), pp. 6–7 (stating that: "Perez and other members of the Bushwick Parents Organization (named for the Brooklyn, N.Y. neighborhood in which the families live) argue that many immigrant students are needlessly kept in bilingual classes for up to six years, the maximum time allowed under state law. They say bilingual education stifles their children's learning and point to studies showing that after three years 75 percent of bilingual students in Bushwick's District 32 have not been moved into mainstream classes. . . Irate Bushwick parents argue that many of these students would be better off in mainstream classes. They have filed a lawsuit asking the state education commissioner to deny requests for such waivers and to require the state to review each child's progress individually. State education officials claim that they lack the resources for individual tracking and say that parents have the power to remove their children from bilingual education. . . But immigrant parents want to see the programs revamped. They believe bilingual education as structured in New York City doesn't work—and might even inhibit the learning of English. Indeed, they might be right: after three years of bilingual education, one-third of bilingual students in District 32 scored lower on English-language tests than when they started. And the city's bilingual education program was blasted last year in a report issued by New York's Board of Education. The report concluded that students-even recent immigrants—who took most of their classes in English generally fared better than those in bilingual education.").

32 *See* David J. Ramirez and Denise Douglas, *Language Minority Parents and the School: Can Home-School Partnerships Increase Student Success?* (Sacramento, CA: California State Department of Education, Bilingual Education Office, 1989), p. i (hereafter cited as Ramirez and Douglas, *Language Minority Parents and the School*) (stating that: "[a] successful educational program can best be realized when parents and school personnel cooperate with one another to provide children with a supportive educational environment. . . At the national level, there has been an increased interest in the participation of parents in their children's schooling. For example, the Even Start program, originated in 1989, is a federal attempt to improve children's school achievement through parent education and involvement.").

In formulating policies that work to the greatest educational advantage for students, policymakers and educators should acknowledge parent-school relations vary greatly across schools and school districts.[33] Each school district must be evaluated to determine the nature of the relationship existing between parents and schools. This evaluation is especially important in the context of developing programs for students having limited English proficiency because of the sharply divided attitudes of parents with respect to the amount of native language instruction they wish their children to receive.

Education researchers have suggested the "home school partnership" as a useful means of establishing a supportive learning environment based on a "common purpose and mutual understanding" between parents of students with limited English proficiency and school personnel.[34] The concept of the home school partnership is based on the ways in which parents and school personnel can work together to meet students' educational needs.[35] School personnel and parents must share important information. For example, parents of students with limited English proficiency need to know the educational options available to their children. Parents can obtain this information most easily from school personnel. Moreover, the process of sharing this information can help create a partnership between parents and teachers.[36] There are numerous obstacles to successful home-school partnerships on both sides. For example, most educators do not know the techniques and procedures for facilitating such a partnership, because it is not generally part of their professional training.[37]

Although Title VII of the Bilingual Education Act has contained a legal mandate for parental involvement in programs it funds, parental participation remains limited.[38] Nonetheless, parents and schools working together clearly improves students' chances of attaining English lan-

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33 *See* Moran, *The Politics of Discretion*, p. 1346 (noting that "[s]ome districts have considerable experience in soliciting parental input, while others have taken few, if any, steps to encourage parental participation.").

34 *See* Ramirez and Douglas, *Language Minority Parents and the School*, p. i (identifying and reviewing successful parent involvement programs for language minority parents of elementary school through secondary school children that could serve as a basis for the development of a home-school partnership model).

35 Ramirez and Douglas, *Language Minority Parents and the School*. The authors suggest that in developing a model for a home-school partnership, schools might address the following questions: "1) Why should language minority parents be involved in schools?; 2) How effective is parent involvement for language minority parents?; 3) In what ways can language minority parents be involved in schools?; and 4) What are the basic components of a successful parent involvement program for language minority parents?" Ibid., pp. i–ii.

36 Ibid., p. i.

37 Ibid.

38 Ibid., p. 4. Ramirez and Douglas note that: "[e]ven with a legal mandate for more than a decade, parent participation in Title VII is limited. A national study of parent involvement in Title VII found that although all sites had parent advisory councils, the councils did not have a significant role in project decisions." (citing R. Cardena-Munoz and J. Keesling, *Parents and Federal Programs, Volume 4: Title VII. The Study of Parent Involvement* (Santa Monica, CA: System Development Corporation, 1981)).
Although most sites had some sort of parent education, as well as organized ways for parents to provide support for the school, the extent of these activities varied a great deal. Even activities that encouraged parents to teach their children at home and that required communication between parents and schools were found only in a minority of sites. The lack of parent involvement among these programs is surprising, given the availability of staff who speak the same languages as the parents and the legal mandate to involve parents and the community. Ibid.

guage fluency and academic success.[39] Moreover, such a "home-school" partnership is a key component in any plan to ensure equal educational opportunity for students with limited English proficiency.

Parental Notification and Inclusion: Civil Rights Implementation, Compliance, and Enforcement Activities

OCR's Title VI compliance standards on notification for parents of students with limited English proficiency, set forth explicitly in the May 1970 guidelines, require that school districts ensure the same parental notification to students with limited English proficiency provided all other students. This requirement reflects the obligations created under *Lau* to provide effective participation and meaningful access to the school's regular education program. In addition, this requirement supports nondiscrimination, because it seeks to ensure students who are limited English proficient enjoy the same educational benefits as those the regular education program offers majority students.

OCR regional offices seek to establish contacts with parents and community groups in support of compliance reviews and technical assistance activities. The regional offices undertake a number of activities, such as participation in parent and community group meetings and efforts to open a dialogue between the school officials and parents. However, OCR's written communications to school districts, such as letters of finding and resolution agreements, do not always address the issue of parental involvement. In addition, important weaknesses remain in OCR's record, primarily owing to the lack of policy guidance. Although in conducting civil rights compliance, OCR appropriately places an emphasis on the role of parents in the development and implementation of education programs, OCR's Title VI/*Lau* policy guidance does not address this issue.

OCR's implementation and compliance efforts exhibit other serious weaknesses. OCR's *Lau* policy largely lacks guidance on parental notification and involvement. The May 1970 guidelines contain the only reference to parents in OCR's policies in the specific context of parental notification. OCR's most recent policy guidance in the September 1991 policy update does not address parental involvement either in the compliance review or technical assistance contexts.

In its policy guidelines for implementing *Lau* compliance activities, including reviews, complaint investigations, and technical assistance for State and local education agencies, OCR explicitly recognizes the importance of parental involvement as an indicator of a school district's compliance with Title VI. For example, the May 1970 guidelines, in identifying ways of determining

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39 *See* Ramirez and Douglas, *Language Minority Parents and the School*. Ramirez and Douglas conclude that: "[t]he primary goal for involving language minority parents has often been to satisfy program requirements, but a successful parent involvement strategy must pay attention to parents' own needs. Besides being able to communicate with the school in a language they can understand, parents need to be able to form relationships with school staff which are respectful of their culture, interests, and needs. In addition, they are likely to need information about the educational system, reassurance that they can contribute in important ways to their children's education, and practical training in how to do so. When approached from the perspective of developing a partnership, parents are eager to collaborate with the school. . . There are many possible roles for parents from classroom aide to school board member, but the most promising way to reach the most parents and help the most students, is to involve parents in working with their own children at home in ways that support the school program. Certain behaviors and attitudes of families correlate highly with student success, and many of these can be learned. For example, parents can be encouraged to talk to their children about school and to listen to them read. An important ingredient is the sense of empowerment that parents gain when they are validated in the importance of their role. . . Successful parent involvement programs develop real partnerships between parents and the schools in which communication is a key. These programs have clear objectives which reflect parent concerns and skills. While parent involvement may differ by grade level, it is needed throughout a child's educational career. At the elementary level, a most promising role for parents is to involve them in tutoring their own children and being conscious of their role as their children's first teacher. At the secondary level, there is a need for parents to be active partners in the academic and career guidance of their children in order to assure high school graduation and help them to make the transition to further education and/or work." Ibid., p. 38.

school districts' compliance with respect to the development and implementation of education programs for students with limited English proficiency, states:

> School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.[40]

OCR policy mentions parental involvement in the development and implementation of education programs for students with limited English proficiency. For example, the December 1985 memorandum contains a reference to parents in its discussion of "whether there is a need for an alternative program." It states "[m]any school districts screen students using information such as a language assessment test, information from parents, or structured interviews, to determine which language minority students may need further assessment and possible placement into an alternative program."[41]

However, neither the December 1985 memorandum nor the September 1991 policy update discuss requirements for parent involvement or notification in the context of compliance reviews or complaint investigations. The September 1991 policy update does not make any mention of parental notification as an education program requirement. In fact, the September 1991 policy update contains only one reference to parental or related issues such as parental notification. In the context of access to gifted and talented and other specialized programs, the memorandum states OCR will consider whether a school district has conveyed the reasons to students and parents as to lack of participation by students having limited English proficiency in such programs.[42]

Although OCR's policy guidance memoranda do not emphasize parental involvement, other OCR documentation refers to it more specifically. Innovative programs developed by OCR regional offices are disseminated throughout the agency. For example, OCR's Region VII's "Profile, Assessment and Resolution Reviews" (PAR reviews) pilot contains a fully developed section on "Notice to Non-English Speaking Parents and Guardians."[43] This document contains a section entitled "Involvement of Parents and Community Members," which provides the following information on the involvement of parents and community members:

> As part of the PAR review process, OCR staff will meet with parents and members of the community who have an interest in the civil rights issues under review. The purpose of these meetings will be to inform such individuals about the issues, and to emphasize OCR's efforts to work cooperatively with school officials and other parties.
>
> OCR staff also may obtain feedback in addressing civil rights issues, and their recommendations for improvement. OCR will share this feedback with school officials in a constructive manner, protecting the identity of individuals.
>
> OCR's overall goal in working with school officials, parents, and community members will be to facilitate dialogues that will result in timely resolutions to any existing civil rights concerns, and in less need for registering official complaints with OCR.[44]

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40 U.S. Department of Education, "Identification on Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11,595 (1970), 34 C.F.R. § 100.3(b)(2) (1996), p. 2.

41 U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," Dec. 3, 1985, p. 4.

42 Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991, p. 8.

43 U.S. Department of Education, Office for Civil Rights, Region VII–Kansas City, MO, "Profile, Assessment, and Resolution Reviews: Partnership Approaches to Civil Rights Compliance: A Region VII Pilot Program."

44 Ibid., p. 3.

There are several noteworthy aspects of this description that help to make this pilot program appear as an innovative and promising means for furthering the goals of equal educational opportunity through parent involvement. For example, it shows how the PAR review pilot program emphasizes not only parental but *community* involvement as well. The promotion of community involvement serves the important purpose of securing a broader range of interest among individuals throughout the community. In this fashion, the community as a whole has an opportunity to become involved in the civil rights issues OCR is evaluating. In addition, the process the PAR review program seeks to establish is a *cooperative* effort between OCR staff, the school district, parents and the community. This cooperation facilitates the development and implementation of education programs to serve students better.

OCR also has produced substantial technical assistance documentation for school districts containing information on parental involvement. For example, the recent "Promising Practices and Programs for Serving National Origin Limited English Proficient Students," prepared by the headquarters *Lau* team, contains information on a two-way bilingual immersion program in California that places a strong emphasis on parental involvement in program development and implementation.[45] The document also discusses six other programs from school districts around the country that the OCR *Lau* Team has identified as promising practices.[46]

The descriptions of these programs each address the way the programs incorporate parental involvement in their development and implementation. For example, the outline of an El Paso, Texas, alternative language program for students having limited English proficiency in grades K–6, contains the following description of its parent outreach program:

> The School makes considerable effort to involve parents in the school life of their children. Parents are involved in the governance process and support classroom and school-wide activities. The staff person, who acts as liaison between school and the home and was hired with Chapter I funding, plays a key role in ensuring that parents of the school's LEP students become

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45 *See* U.S. Department of Education, Office for Civil Rights, "Promising Practices and Programs for Serving National Origin Limited English Proficient Students," *Lau* Team, March 1996 (hereafter cited as OCR, "Promising Practices," March 1996) (describing this program's focus on parental involvement in the following way: "*Parental Commitment.* Program participants and their families are expected to make a minimum five year commitment to the program. The program requires district, staff, and parent support. Active recruitment must take place in the community. The current principal is bilingual and has been very active in promoting the program in both the English speaking and Spanish speaking communities. Parental involvement is encouraged, including volunteering time in the classroom. A monthly newsletter lets parents know what units will be taught in the child's class and encourages parents to reinforce these objectives at home. Parent workshops are offered, to train parents in assisting children with homework and to become knowledgeable of the second language process. Classes in both Spanish and English as a second language are provided for interested parents. The parent organization, ¡HABLA! Friends of River Glen Elementary, offers opportunities for parents to contribute to the school program. This organization supports the school in a variety of ways (e.g., fund raisers, campus beautification days, cultural events). *Dissemination.* Project Two-Way has developed steps to help other sites plan and develop similar programs. These steps include an awareness session at River Glen, presentations at the adoption site and to the adoption site's school district personnel, and a formal adoption contract. Project Two-Way staff will help the adoption site staff determine its areas of need for future training and establish a staff development training calendar. Adoption sites must use testing and evaluation materials consistent with those used at River Glen.").

46 These include the following programs: Alternative Language Program for LEP Students (grades K–6), Accelerated Reading Program and the Writers' Workshop at Del Norte Heights Elementary School, Ysleta Independent School District (District), El Paso, TS; Project EXCELL: *Excellence in Chinese / English Language and Learning*, Seward Park High School, New York City, NY; Haitian Creole Bilingual Program, Including the Search for Knowledge Program, Graham and Parks Alternative School, Cambridge Public Schools, MA; Success for All (Program), as adapted for LEP Students, Francis Scott Key Elementary School, School District of Philadelphia, PA; Assessment and Intervention Model for Bilingual Exceptional Students: AIM for BEST, a school district in the Austin/San Antonio area, TX; Comprehensive Development Bilingual (Two-way) Program, Inter-American School, Chicago Public School District, Chicago, IL. OCR, "Promising Practices," March 1996.

active in the school community. The home liaison person is bilingual and lives in the neighborhood. Her roles include serving as attendance liaison, providing ESL instruction to parents three mornings a week, offering parent training, and staffing the parent-activity center.[47]

This description provides a brief overview of the program's efforts to conduct parent outreach and promote parental involvement. It also appears to reflect a program with a strong commitment to promoting parental involvement.

The more traditional methods of civil rights implementation, compliance reviews and complaint investigations, also involve contact with the school district's parents. However, the approach here is somewhat different in that OCR staff conduct their factfinding in the form of an investigation in which they contact parent groups to make specific determinations. These might include the level of parent involvement and the kind of parental notification afforded the school district's parents about the program. Advice from parent groups can play an important role in the process undertaken by OCR's *Lau* compliance staff in selecting school districts for a compliance review. For example, OCR's Denver Enforcement Office (formerly Region VIII) includes parent groups among the "stakeholders," or individuals with an interest in school districts' efforts to develop and implement adequate education programs, with whom it interacts to determine which school districts within a State or geographic region may present noncompliance concerns.[48] In addition OCR staff involved in *Lau* compliance activities rely on parent involvement in school district's education programs in conducting monitoring activity. For example, the Denver Enforcement Office (formerly Region VIII) uses input from parents in implementing its monitoring activities for school districts with whom it has negotiated compliance agreements.[49]

Contact between parents and OCR staff also occurs in the context of technical assistance during the course of ongoing investigations.[50] In compliance reviews and complaint investigations, contact between *Lau* staff and parents before and during the reviews includes a process of both factfinding and information sharing with the school districts and parents themselves.[51] OCR

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47 Ibid., p. 4.

48 In responding to the question "What procedures do you undertake in identifying schools districts for compliance reviews?" Angela Martinez, OCR's National *Lau* Facilitator stated that: "[w]e look at a variety of factors. In terms of "set procedures," it would be that you have to look at a number of factors such as recommendations received from stakeholders like State departments of education or community/educational resource groups, parent groups, school district personnel themselves have nominated districts to be reviewed, advocacy groups, etc." Angela Martinez, National *Lau* Facilitator, Office for Civil Rights, U.S. Department of Education, telephone interview, June 24, 27, 1996, p. 2.

49 In response to the question "What does monitoring activity entail?," Angela Martinez, OCR's National *Lau* Facilitator stated that "[i]t's a variety of things—letters from OCR staff visiting on-site, conducting follow-up review to see how the district's doing. We also receive information from the State department whose been working with them to see how they're doing. We also have received calls from parent and community groups and school staff themselves to tell us what's going on in the district." Ibid., p. 7.

50 Cathy H. Lewis, Acting Senior Enforcement Officer for the Western Part of the United States, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., June 14, 1996 (hereafter cited as Lewis interview) (noting in the context of conducting technical assistance with school boards that: "we've had situations where you go in and meet with parents, we've had situations where you go in and meet with the school board as well to help them understand what the obligations are. This would occur most likely in the context of an ongoing investigation." Ibid., p. 11.).

51 Lewis interview. In response to the question "How do you explain to parents about their civil rights responsibilities and the school districts' civil rights responsibilities?," Ms. Lewis stated that: "there is a specific time allocated in the investigation, the on-site part of the investigation, to meet with parents and parent groups which can be very effective. I recently heard that one office was doing a variation on that which I really liked. They were sending somebody in advance of when the investigation was going to start, several weeks in advance to identify who the parent groups were and to do some initial interviewing, talking, checking so that by the time it all came together for the investigation you probably had a larger audience where there were ideas to give to the investigators, so that the investigators would know where there were areas

attempts to include the community as a whole by involving community groups in the process of conducting its onsite factfinding activities.[52]

OCR evaluates parental involvement in school district programs in conducting its complaint reviews and compliance investigations as an aspect of program implementation. Lack of parental involvement in a school district may constitute a violation under Title VI if it is associated with differential treatment between students who are members of national origin or language minorities and those who are not.[53] OCR staff are following explicit guidance addressing this issue from the May 1970 guidelines which state that school districts are required to provide the same *notification* to parents of students who are members of national origin or language minorities.[54] OCR may prove through its factfinding in conducting a compliance review or complaint investigation that there is differential treatment on the part of the school district with respect to the issue of notification to establish noncompliance. However, such a finding may be more difficult to establish where the problems with lack of parental involvement in the school district have arisen in the absence of any differential treatment as to parental notice on the part of the school district. Since the promotion of parental involvement involves issues much broader than notification, OCR engages either directly, by interacting with parent groups and individual parents, or indirectly, by promoting the school district's efforts to conduct outreach and education with the parents and the community.[55]

In general, OCR's letters of finding since 1990 have provided school districts with a thorough assessment of program practices associated with parental involvement issues.[56] One measure of

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that seemed to be a blank, where there were areas that needed to be filled in. Another thing that we started doing was that when we completed an investigation, assuming that we found a violation, part of the resolution process into our agreements was actually having the district meet with the parents and explain to them what their obligation was as far as providing services to the kids and to the extent that OCR had identified problems how the district was proposing to address those. So that they would engage this conversation not only with us but with the parents themselves." Ibid., pp. 10–11.

52 Lewis interview. Ms. Lewis noted in response to the question "How do you make the connection with the whole community so that they will understand that you are not requiring the school to provide services to one group at the expense of another group?" that "[t]hat's a good point. It's an area of our community outreach that has become so much a part of the *Lau* activity that we need a second generation take on that because we do not to ensure that the community as a whole is brought into the discussion so that they know why we're there, what we're talking about and the district's obligation particularly where it involves expending money because everybody is short on money these days." Ibid., p. 11.

53 *See* John Binjes, Chief Civil Rights Attorney, Seattle Enforcement Office (formerly Region X), Office for Civil Rights, U.S. Department of Education, telephone interview, June 10, 1996. Answering in response to the question "Would you consider not providing parental notification a violation of Title VI? Or would you consider that a violation of Title VI?" Mr. Binjes indicated that "[w]e find parental notification a problem with Title VI where there is notice to parents calculated to reach the nonminority community but not the minority community. You get the classic different treatment situation where we might raise a problem. We have raised concern with school districts with respect to whether a parental notification, if it is not in a language the parent can understand is it really meaningful notice to them. That has raised some historical complaints with our office. There is no mandatory parental notification within the Title VI regulation, so we would be looking for differences in treatment or in meaningfulness." Ibid., p. 7.

54 May 1970 guidelines, p. 2.

55 Alice Wender, Program Manager, D.C. Enforcement Office, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., July 19, 1996.

56 *See generally*, Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Nat Lommori, Superintendent, Lyon County School District, Yerington, NV re: Case No. 10–94–5005, July 17, 1995; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to John E. Bierwirth, Superintendent, Portland School District, Portland, OR, re: Case No. 10–94–5004, Dec. 27, 1994; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Steve Wisely, Superintendent, Medford School District, Medford, OR, re: Case No. 10–94–5002, Oct. 28, 1994; Taylor D. August, Regional Director, Region VI, Office for Civil Rights, U.S. Department of Education, to Dee Carter, Superintendent, Carrizo Springs Consolidated Independent

the thoroughness of OCR's letters of finding is the number of important contexts in which OCR refers to parental involvement. For example, a letter of finding from OCR's New York Enforcement Office (formerly Region II) informing a school district in Edison, New Jersey, of a favorable compliance review refers to OCR's evaluation of the means through which a school district program identifies and assesses students with limited English proficiency. This letter of finding states:

> The District's identification procedures also provide that students who pass the initial screening and are not placed in an alternative language program may be reevaluated upon teacher recommendation, with the review/approval of the principal *or upon parental request* . . . . OCR conducted a review of 210 files of LEP students who were enrolled in the District's alternative language programs during the 1990–91 school year. The file review verified that the identification procedures have been implemented in each school in the District. Specifically, OCR found that the student files contained evidence of a completed HLS, LAB or MAC scores and achievement information for the individual student. A review of the files further revealed that the HLS was frequently filled out with assistance from school personnel and signed by the student's parent/guardian. OCR found documentation in some student files indicating that the information to complete the form was provided through a translator who accompanied the parent/guardian to the school. OCR's file review also revealed that, if an LEP parent/guardian comes to the District to enroll a child and is not accompanied by a translator, the District will contact a bilingual teacher or other staff member who can communicate in the parent/guardian's language to assist in the registration process. The District has also established an extensive list of community volunteers who may be called upon to serve as translators.[57]

In another example from OCR's New York Enforcement Office, a letter of finding addressed a complaint from a parent that a school district was "unresponsive to Asian national origin parents' inquiries for information."[58] The complainant alleged that the school district was engaging in differential treatment of Asian parents.[59] The letter of finding provides a thorough evaluation as to the specific allegations made by the parent in reference to the school district's handling of inquiries made by parents.[60] In addition, it provides the school district with the necessary information

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School District, Carrizo Springs, TX, re: Case No. 04-93-5010, Sept. 30, 1994; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Jim B. Hensley, Superintendent, Kansas City Unified School District #500, Kansas City, KS 66101, Case No. 07–92–5004, July 29, 1993; Cathy H. Lewis, Regional Director, Region VIII, Office for Civil Rights, U.S. Department of Education, to Raul Bejarano, Superintendent, Nogales Unified School District #1, Nogales, AZ, re: Case No. 08–93–5002, May 25, 1993; Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Joseph Kreskey Superintendent, Edison Township Public School District, Edison, NJ, re: Case No. 02–91–5001, July 7, 1992.

57 Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Joseph Kresky, Superintendent, Edison Township Public School District, Edison, NJ, re: Case No. 02–91–5001 (emphasis added).

58 Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Dennis Clancy, Superintendent, Franklin Township Public Schools, Somerset, NJ, re: Case No. 02–92–1004, Mar. 6, 1992, p. 1 (hereafter cited as "Kuebler LOF, Mar. 6, 1992").

59 Ibid.

60 The letter of finding states in pertinent part that: "[t]he complainant alleges that the District is unresponsive to Asian national origin parents' inquiries for information. As an example, he stated that he called the School's Principal and was directed to speak with a District official whom he alleges acted disrespectfully towards him in his request for information. Specifically, the complainant stated that the District official refused to spell her name for him.
"OCR learned that the District has established procedures for routing telephone inquiries from parents. These procedures require that any question regarding a specific student is initially directed to the student's teacher, a general question pertaining to District policy is handled by the Program Supervisor, and specific questions concerning ESL programs are answered by the ESL Teacher/Screeners. OCR further learned that the Assistant Superintendent for Curriculum and Instruction speaks with the parent if any of the individuals mentioned above are not available.
"OCR's investigation revealed that the complainant had both general and specific questions related to ESL. The complainant telephoned the Principal on September 13, 1991, and in accordance with the District's procedures, the call was directed to

to contact OCR staff should the school district have further questions or require technical assistance on addressing similar issues in the future."[61]

In negotiating settlements with school districts, OCR seeks to include provisions that ensure school districts will meet their legal obligations to provide parental notice. In cases where OCR identifies a concern with the level and/or quality of the school district's efforts to promote parental involvement, either in relation to the notification issue, or for other reasons, OCR relies on a number of different means to resolve the problem. It may use technical assistance to address the problem. It may also include in compliance agreements negotiated with the school district specific provisions promoting parental involvement.

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one of the two ESL Teacher/Screeners (the Teacher) at the School. OCR's interviews with the complainant and the Teacher revealed that the complainant advised the Teacher that he was opposed to the District's general testing procedures. The Teacher referred the complainant to the Supervisor and gave the complainant the Supervisor's telephone number. OCR was advised by the complainant and the Supervisor that the complainant did not contact the Supervisor.

"Additionally, OCR found that the Teacher answered the complainant's inquiries. OCR confirmed with both the complainant and the Teacher that during the conversation the Teacher identified herself using only the first initial of her name and, when asked to spell her name, reiterated that the complainant should refer to her in the same manner. The Teacher and the complainant informed OCR that the complainant did not ask the Teacher to spell her name thereafter, including during subsequent conversations. OCR was further advised by the Teacher and other District and School staff members that the Teacher's practice is to have persons, including fellow District staff members, refer to her by her initial, due to her experience that her name is easily mispronounced and misspelled. Additionally, OCR noted during its on-site investigation that the Teacher was greeted and referred to by colleagues by her initial. Therefore, the complainant was treated by the Teacher in the same manner as other individuals when he was told to address her by her initial. . . OCR found no evidence that the District's procedures regarding inquiries addressed to the Principal were selectively applied to Asian parents. Therefore, OCR concludes that the District does not treat Asian parents in a different manner with respect to inquiries." Ibid., pp. 6–8.

61 Ibid., p. 8.

Chapter 6

Utilizing Neutral and Nondiscriminatory Screening and Diagnostic Procedures

Background

To date, OCR has not issued policy guidelines providing school districts with criteria for determining whether their procedures for identifying students with limited English proficiency are adequate.[1] The procedures for identifying students who may have limited English proficiency, assessing such students' proficiency in English, or determining whether they are eligible to be served by an alternative language instruction program vary from State to State and school district to school district. Local education agencies identify, assess, and evaluate such students, usually according to State guidelines, through a process that generally includes the following steps: the development of a pool of students who potentially meet the criteria for limited English proficiency used by the school district or the State in which it is located; assessment of the English language proficiency of students in this pool, and a determination of whether students in the pool meet the district's (or State's) criteria for being considered limited English proficient, or a decision to place them in a program for students with limited English proficiency.

Most States use one or more of the following procedures for identifying, assessing, and placing their populations of students having limited English proficiency: 1) a "home language survey" is conducted to identify students who potentially have limited English proficiency, 2) students are then tested on some measure of English language proficiency and classified accordingly, and 3) teachers and staff contribute their input on the placement. A 1982 study described selection procedures as characterized by: 1) home language surveys (questionnaires directed to parents), 2) oral language proficiency tests, and 3) some use of tests of English reading and writing, usually from second grade and up. Another study found 90 percent of school districts surveyed used an English oral language proficiency test, 72 percent measured English reading skills, 56 percent measured English writing skills, and 6 percent assessed student native language skills.[2] Each of these practices may be used in such a way that the

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1 *See* General Accounting Office, *Limited English Proficiency: A Growing and Costly Challenge Facing Many School Districts*, January 1994, pp. 84–85 (noting that "in general, LEP children have difficulty speaking, reading, writing, or understanding English. However, currently, no nationally accepted definition of LEP exists, and consensus is lacking on the criteria for determining LEP. This lack is particularly true regarding the level of language skills that constitutes limited proficiency in English.")
In 1980 the Department of Education proposed Federal regulations for implementing the *Lau* decision. These regulations were based on a May 1975 policy memorandum issued by the Office for Education. They would have required school districts to follow a uniform procedure for identifying students with limited English proficiency. However, the proposed regulations were considered overly prescriptive and intrusive on States' authority to tailor educational programs to their respective needs and therefore, were never put into effect. *See* U.S. Department of Education, Notice of Proposed Rulemaking, 45 Fed. Reg. 52,052 (1980).

2 Keith Baker, "Bilingual Education's 20-Year Failure to Provide Civil Rights Protection to Language Minority Students," in Andres Barona and Eugene E. Garcia, eds., *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity* (Washington, D.C.: National Association of School Psychologists, 1990), p. 29 (citing D. Cardozo, *The Reclassification Survey: A Study of Entry and Exit Classification Procedures*, (Los Alamitos, CA: National Center for Bilingual Research, 1984) and Mace-Matluck (1982)).

results it produces are not effective in identification and placement.

The requirement that identification, assessment, and placement procedures must be neutral and nondiscriminatory is embedded in Federal civil rights laws and education funding statutes.[3] The Bilingual Education Act requires applicants seeking Federal funds to show they have made efforts to identify students with limited English proficiency.[4] Moreover, the act requires methods for assessment and evaluation be based on "student evaluation and assessment procedures in the program that are valid, reliable, and fair for limited English proficient students."[5] In addition, the act includes a provision stating: "[s]tudents shall not be admitted to or excluded from any federally assisted education program merely on the basis of a surname or language-minority status."[6] This provision indicates Congress' recognition of the importance of ensuring against the use of flawed identification and placement procedures that may result in illegal discrimination.

Placement in an education program is the first step in providing students having limited English proficiency with the language instruction they will need to function and thrive in an all-English speaking regular education program. Failure to follow neutral and nondiscriminatory screening and diagnostic procedures has resulted in inappropriate placements for students with limited English proficiency. Inappropriate placement or misclassification of students having limited English proficiency into remedial or special education programs, or lack of adequate procedures to place them into a language remediation program appropriate for their level of English proficiency are problems identified in research. For example, evidence exists that students with limited English proficiency, particularly Hispanics, were placed in classes for the "educable mentally retarded" far more frequently than their English-proficient peers.[7] It, therefore, is crucial that each student be identified and placed appropriately. The screening and diagnostic procedures used to make these important assessments must be designed carefully to avoid improper placement. If a student is misclassified as having limited English proficiency, the inappropriate placement may result in serious educational problems for the student that could affect his or her entire academic career.

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3 Title VI, the Equal Educational Opportunities Act, and the Bilingual Education Act all require overall neutral and nondiscriminatory identification, assessment, and evaluation procedures for placement into educational programs. Moreover, the Federal courts and OCR policy have explicitly recognized the importance of neutral and nondiscriminatory testing instruments in the development of educational programs for students with limited English proficiency. *See* Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989); Gomez v. Illinois, 811 F.2d 1030 (7th Cir. 1987). *See also* Michael L. Williams, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, Memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sep. 27, 1991. It should be noted that this policy memorandum refers to *national origin minority* students. Thus, the civil rights protections here derive from an individual's status as a member of a national origin minority group such as Hispanics, Asian Americans, and Native Americans.

4 These include the following: "(1) In General.—An application for a grant under this subpart shall contain the following: (A) A description of the need for the proposed program, including data on the number of children and youth of limited English proficiency in the school or school district to be served." 20 U.S.C. § 7426(g)(1)(A) (1994).

5 20 U.S.C. § 7426(h)(3) (1994). The act states as part of its findings, policy, and purpose that at least one adverse impact of "inappropriate evaluation procedures" for students with limited English proficiency is their "disproportionate and improper placement in special education." 20 U.S.C. § 7402 (a)(5)(B) (1994).

6 20 U.S.C. § 7602(b)(4) (1994).

7 Leonard M. Baca and Hermes T. Cervantes, *The Bilingual Special Education Interface* (Columbus, OH: Merrill Publishing, 1989), pp. 16–18. *See also* J.D. Finn, "Patterns in Special Education Placement as Revealed by OCR Surveys," in K. Heller, W. Holtzman, and S. Messick, eds., *Placing Children in Special Education: A Strategy for Equality* (Washington, D.C.: National Academy Press, 1982), pp. 322–81; V. Bergin, *Special Education Needs in Bilingual Programs* (Arlington, VA: National Clearinghouse for Bilingual Education, 1980).

Barriers to nondiscriminatory identification, assessment, evaluation, and placement include specific flaws and/or discriminatory elements in implementing screening and diagnostic procedures that are used frequently in identifying and assessing students with limited English proficiency and placing such students in programs for students with limited English proficiency. Problems can arise in: 1) conducting the home language survey to identify students who may have limited English proficiency, 2) testing for some measure of academic or language performance and classifying students accordingly, and 3) the use of teachers' and staff' input in placement decisions. The following discussion summarizes the educational research on these barriers and on ways of improving their effectiveness.

Identification, Assessment, and Placement of Students with Limited English Proficiency

Discriminatory screening and diagnostic procedures can result in the failure to identify and place students with limited English proficiency in education programs properly. This failure derives in part from the lack of guidelines for identification, assessment, and placement of students with limited English proficiency.

A Lack of National Guidelines on Identification, Assessment, and Placement of Students with Limited English Proficiency

There are no Federal criteria for identification, assessment, or evaluation procedures for students having limited English proficiency. To the extent there are Federal provisions relating to identifying, assessing, and placing students with limited English proficiency, they can be found in the Bilingual Education Act. For example, the act provides that State agencies and school districts can receive Bilingual Education Capacity and Demonstration grants under the act only if the Secretary of Education is satisfied that their procedures for assessing, and placing students with limited English proficiency are "valid, reliable, and fair."[8] The Office of Bilingual Education and Minority Languages Affairs requires local educational agencies receiving grants under the act to provide the definition/criteria the school district uses to identify students with limited English proficiency and the methodology they use to make this identification.[9] The act, however, does not offer any guidance on the types of procedures or processes that States or schools may use in identifying and placing students in special instruction programs based on their language needs. Thus, States and local school districts lack guidance from DOEd regarding appropriate and acceptable procedures for identification, assessment, and placement of their own populations of students with limited English proficiency.[10]

The Federal Government attempted to issue uniform guidelines in the form of the "*Lau* Remedies," or the "*Lau* Guidelines."[11] In 1978, the Department of Health, Education, and Welfare announced it would publish the 1975 *Lau* Remedies as proposed regulations in the *Federal Register*. The Notice of Proposed Rulemaking (NPRM) was published by the Department of Education in 1980 and became known as the *Lau* Guidelines.

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8 20 U.S.C. § 7426(h)(3)(1994).

9 U.S. Department of Education, Office of the Secretary, *The Condition of Bilingual Education in the Nation: A Report to the Congress and the President*, June 30, 1992, p. 9.

10 Ibid.

11 *See* U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, February 1992, pp. 82–84 (detailing the early post-*Lau* efforts to develop guidelines for the development of and placement in education programs of students with limited English proficiency. The Commission's report explains that since the *Lau* Court did not address the kind of special instruction schools should provide to students with limited English proficiency, the Office for Civil Rights at the Department of Health, Education, and Welfare undertook the development of guidelines to assist schools in understanding and meeting their new responsibilities under the law. The guidelines, officially entitled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols*," and informally

The NPRM attempted to clarify assessment standards by requiring school districts to:

- identify the primary language of their students;
- determine which students had limited English proficiency by utilizing either achievement or oral language proficiency tests (those scoring below the 40th percentile when compared to nonminority students in the district, State, or Nation); and
- assess LEP students' relative proficiency in English and their primary language.[12]

These guidelines were viewed by many as placing too much Federal limitation or control on State educational policy, because they prescribed bilingual/bicultural and multilingual/multicultural programs. They never were adopted formally as DOEd regulations. However, they continue to have a tremendous influence over State and local education agencies since many of the identification, assessment, and placement practices used in school districts today can be traced to the requirements contained in the *Lau* Guidelines. The *Lau* Guidelines were withdrawn in 1981.[13] They were not replaced with new guidelines addressing the criteria necessary for schools' identification procedures to be nondiscriminatory. As a result, States continue to rely on some of the discredited or questionable educational practices advanced in the *Lau* Guidelines.

The Federal courts have fashioned remedies requiring the use of assessment procedures for students bringing suit against local school districts and State educational agencies. However, these judicially mandated remedies have provided only partial and generally inadequate guidelines in approaching the problems associated with identification and assessment procedures. For example, in *Gomez v. Illinois*,[14] the plaintiffs argued that the State educational agency violated Section 1703(f) of the Equal Educational Opportunities Act by failing to provide "adequate, objective, and uniform, guidelines" to local school districts for identifying students with limited English proficiency.[15] This court clearly advocated the use of uniform guidelines throughout the entire State. However, the court did not go into any detail in explaining what these uniform guidelines should look like and how they might be developed.

Problems Identifying Students Who Potentially Have Limited English Proficiency

The Use of Home Language Surveys

The procedures used by school districts to identify a pool of students who potentially have limited English proficiency, in particular, the use of the home language survey, can be ineffective. Currently, 19 States require local school districts to use a home language survey to screen for students of non-English language background; another 23 States only recommend that school districts use such a survey.[16] Of the 11 States that do

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known as the "*Lau* remedies," were published in August 1975. They were widely circulated in memorandum form to school officials and the public. Although the *Lau* Remedies were neither published in the *Federal Register* nor promulgated as formal regulations, they quickly became the de facto standards that the Office for Civil Rights applied to assess school districts' compliance with Federal civil rights laws. In August 1980, the newly formed Department of Education published in the *Federal Register* a Notice of Proposed Rulemaking (NPRM), 45 Fed. Reg. 52,052 (1980), which required school districts receiving Federal assistance to provide special instruction to all students with limited English proficiency. The NPRM was widely criticized for being too prescriptive. It was officially withdrawn in February 1981.).

12 Notice of Proposed Rulemaking, 45 Fed. Reg. 52,052 (1980).

13 *See* 46 Fed. Reg. 10,516 (1981) (Stating that: "The Department conducted hearings on these proposed rules in six major cities during September, 1980. More than 4,000 oral and written comments were received. In light of the public comment regarding the proposed rules and issues raised by that comment, the Department has determined that the proposed rules should not be issued as final regulations.").

14 811 F.2d 1030 (7th Cir. 1987).

15 811 F.2d 1030, 1033 (7th Cir. 1987).

not require or recommend the surveys, 5 States have no screening requirements; procedures are selected by the districts or schools themselves.[17]

The administration of a home language survey to students entering a school district is a practice advanced in the *Lau* Remedies and the August 1980 Notice of Proposed Rulemaking based on them.[18] As is the case for many of the educational practices advanced in these guidelines, scholarly research has challenged the educational effectiveness of home language surveys. The principal problem identified by researchers has not been the concept behind the practice but the way in which it has been implemented, particularly by States following the old *Lau* Guidelines. For example, the *Lau* Guidelines recommended that the home language survey ask if *someone*, not just the child, in the home speaks a language other than English.[19] Extensive intergenerational differences in language use make this question problematic. It is common in immigrant families for the grandparents or parents to rely on the use of a language other than English. However, this knowledge does not provide any information about what language the child speaks.[20] If a monolingual English-speaking child answers "yes" to the question of whether someone in his home speaks a language other than English, he may be identified erroneously as potentially having limited English proficiency. The remaining procedures commonly used to determine the child's level of English language proficiency may not correct the mistake.[21]

Misrepresentation by parents or guardians who feel that their children will be placed in programs not conducive to learning English if they respond truthfully with regard to the native language spoken at home may be another problem with the use of home language survey. This problem, too, points to the larger problem at the heart of the controversy over the use of the home language survey as a tool in the process of identification and placement: the lack of uniform standards for quality control as to how it is being implemented. Researchers have found that the principal problem with the home language survey is that without proper implementation the survey is useless as a means of assessing the language proficiency of each student.[22]

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16 Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, 1992), p. 8.

17 Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, 1992), p. 8.

18 In determining whether a student has a primary language other than English, the *Lau* Guidelines state that:
"(1) In kindergarten through eighth grade the identification must be made either by an interview of the student's parent or guardian or by a questionnaire completed by the parent or guardian. The interview must be conducted or the questionnaire be written in a language the parent or guardian fully understands. If the parent or guardian is unable to read a questionnaire, or if a questionnaire is not available in an appropriate language, an interview must be conducted." Notice of Proposed Rulemaking, 45 Fed. Reg. 52,052 (1980).

19 *See* Christine Rossell and Keith Baker, *Selecting and Exiting Students in Bilingual Education Programs*, 17 J.L. & Educ. 589 (1987) (hereafter cited as Rossell and Baker, *Selecting and Exiting Students*). Rossell and Baker note that: "[w]ith regard to identifying students in need of bilingual education, the *Lau* guidelines first required that the student's 'primary language' be identified. A student was considered to have a primary language other than English if any one of three conditions held: (1) the first language the students spoke was not English; (2) the language most often spoken in the student's home was not English; or (3) the language most often spoken by the student was other than English. With all of these criteria, a child who is fully proficient in English could be classified as having a primary language other than English." *Id.* at 598–99.

20 Rossell and Baker, *Selecting and Exiting Students*, at 605.

21 Rossell and Baker, *Selecting and Exiting Students*, at 606.

22 *See* Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity,

The home language surveys that State and local education agencies use to assess students may be unacceptable on the basis of their implementation. For example, in New York City, the "long-standing and often-criticized practice of *automatically* testing all students with Hispanic surnames" was a policy for over 20 years. The New York City Board of Education recently voted to discontinue the policy on a 1-year trial basis. The policy grew out of a 1974 consent decree that settled a suit filed by Aspira, a national Hispanic Advocacy group based in Washington. Many Hispanic parents in the school district feel that testing only students with Hispanic surnames is discriminatory, since it singles out Hispanic students while other ethnic groups have not been subjected to the automatic testing.[23] This practice is a common implementation problem associated with the use of the home language survey. School districts that merely distribute the form on the basis of a student's surname are using the survey improperly. Distributing the survey only to those students with foreign (usually Hispanic) surnames singles out those children from their peers with Anglo surnames. Moreover, neither group of students is being served properly because there may be children who have Anglo surnames yet who have a native language other than English. At a minimum, proper use of the home language survey requires distribution among the entire student population.

Educational experts offer numerous suggestions for how to establish nondiscriminatory use of the home language survey in identification of students with limited English proficiency. Experts agree that the home language survey, properly utilized, can be an invaluable tool as a screening procedure.[24] For example, experts recommend that all State education agencies should conduct home language surveys that inquire as to the student's place of birth and the first language acquired by the student.[25]

In keeping with the goal of appropriate implementation of the home language survey as a procedure for identification of students with limited English proficiency, the Council of Chief State School Officers recently has advanced the following recommendations:

1) State education agencies should require all local school districts to conduct a home-language survey of their students.
2) The survey should inquire about the student's place of birth and the first language acquired. In some instances, the student rather than the parent, might prove to be the most reliable source for information about the first language.
3) Schools should make efforts to ensure that the information obtained in the survey is accurate. The survey should be conducted in the student's native language, orally if necessary. The purpose of the survey should be clearly stated, and the text should be as simple and straightforward as possible. If school personnel com-

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Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency (Council of Chief State School Officers, 1992), p. 8. (Stating that: "These surveys are usually completed by the student or a parent, but may be completed by school personnel. In some cases, parents provide a negative response—even though English is not spoken at home by the parent or students. They do this because the student or parents do not fully understand what is being asked by the survey, and why, or because they are afraid of the ramifications of answering honestly. When this happens, students often are excluded from further assessments and, as a consequence, from the language-assistance program.").

23 Lynn Schnalberg, "N.Y.C. To Stop Proficiency Testing of All Hispanic Students," *Education Week*, vol. 15, no. 24 (Mar. 6, 1996).

24 *See generally* U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment*, May 1993; Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, 1992); Else V. Hamayan and Jack S. Damico, *Limiting Bias in the Assessment of Bilingual Students* (Austin, TX: Pro Ed, 1991); Andres Barona and Eugene E. Garcia, eds., *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity*, (Washington, D.C.: National Association of School Psychologists, 1990).

25 Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, 1992), p. 8.

plete the survey, they should be trained to administer the survey properly and consistently. Follow-up home visits may be necessary to make sure the form is filled out properly. The survey should contain a statement to assure students and parents of their legal rights to education, regardless of their immigration status, and that the results of the survey and subsequent screening/placement procedures will not be reported to immigration officials.

4) The school should conduct the survey quickly and efficiently, so that further assessment for placement can proceed within 10 school days of registration.

5) The survey should be standardized both within and across states to ensure that all students who may be eligible for language assistance programs can be identified and receive further assessment.

6) The survey should be the basis for the development of an initial home environment profile for the student. The full home environment profile should be developed throughout the process of screening, identification and placement. The full profile should contain information about the affective, linguistic, and cognitive needs of the student, as well as other pertinent information. If possible, the profile should include information about the educational background of the student in both the native non-English language and English, including the location of the school(s) previously attended, the language of instruction and the level completed.[26]

These mechanisms may serve to ensure the most appropriate educational practices for identifying potential limited English proficiency in students. Finally, the core value underlying the use of such surveys for identification purposes must be an emphasis on meeting the individual language needs of each student with respect to that student's ability to read, write, speak, and comprehend the English language.

The Use of Standardized Testing

Relying solely on standardized testing to assess the language proficiency of students identified as potentially having limited English proficiency also may lead to biased or discriminatory placement decisions. Standardized testing remains controversial among education researchers for a number of reasons, including discriminatory bias and improper implementation that can result in inappropriate placement.[27] Standardized testing practices can constitute a major barrier to appropriate placement for students who may require special instructional programs.[28] For example, the literature reveals a connection between standardized testing and misclassification or inappropriate placement of students with limited

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26 Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, 1992), pp. 8–9.

27 *See* Betsy B. Waterman, "Assessing Children for the Presence of a Disability," *NICHY News Digest*, vol. 1, no. 1 (1994), p. 13 (hereafter cited as Waterman, "Assessing Children for the Presence of a Disability") (noting that: "Because culture and language affect learning and behavior. . . the school system may misinterpret what students know, how they behave, or how they learn. . . There is also a great deal of research and numerous court decisions to support the fact that standardized tests (particularly intelligence and achievement tests) are often culturally and linguistically biased against students from backgrounds different from the majority culture. On many tests, being able to answer questions correctly too often depends upon having specific culturally-based information or knowledge. If students have not been exposed to that information through their culture, or have not had the experiences that lead to gaining specific knowledge, then they will not be able to answer certain questions at all or will answer them in a way that is considered 'incorrect' within the majority culture. This can lead to inappropriate conclusions about the students' ability to function within the school setting. Therefore, when students come from a nondominant culture or speak a native language other than English, care must be taken in how they are evaluated."). *See also* Larry P. v. Riles, C–71–2270 RFP, Oct. 10, 1979.

28 The principal problem associated with standardized testing practices appears to be that the tests carry a vast potential for bias. This problem is compounded when school officials use procedures for identification and placement that *rely solely* on the results of standardized tests. This reliance on the use of the standardized test points to problems among the school officials, including teachers, with their own misperception of these students and hence with the procedures they rely on to identify them. Waterman, "Assessing Children for the Presence of A Disability," p. 13.
See also U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment* (May 1993), pp. 28–29 (hereafter cited as U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment*); U.S. Commission on Civil Rights, *Civil Rights Issues Confronting Asian Americans in the 1990s* (February 1992), pp. 68–87 (hereafter cited as U.S. Commission on Civil Rights, *Civil Rights Issues Confronting Asian Americans in the 1990s*).

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English proficiency.[29] Standardized testing practices that are creating barriers to equal educational opportunity for such students are largely associated with improper development or implementation or both.

Specific testing practices, such as the use of specific percentile cutoffs on standardized tests, are a concern prominent in both educational research literature and remedies mandated by the Federal courts. The use of percentile cutoffs has been criticized because it may lead to the misclassification of students. Several problems with using percentile cutoffs have been cited. Whatever the percentile cutoff chosen, by the tests design, that percentage of monolingual English students also will score below the chosen percentile and therefore may be misclassified as needing alternative instruction aimed at students with limited English proficiency.[30] Furthermore, researchers contend that a single score cannot by itself differentiate among several other possible causes of a low score. For instance, a single cutoff score cannot differentiate between a student who has limited English proficiency and one who is doing poorly in school.[31] In particular, they caution that using percentile cutoffs may lead to a higher proportion of students from socioeconomically disadvantaged backgrounds being misclassified as having limited English proficiency and needing alternative language instruction.[32] Finally, critics maintain that since standardized tests generally are designed to test the performance of monolingual students and are not designed to measure whether a student knows enough English to perform well in school, they should not be used in determining whether a

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29 *See generally* Thomas Haladyna, "Test Score Pollution: Implications for Limited English Proficient Students," *Focus on Evaluation and Measurement*, vols. 1 and 2, Proceedings of the National Research Symposium on Limited English Proficient Student Issues (2nd, Washington, DC, Sept. 4–6, 1991) (discussing the topic of the second of a two-faceted problem involving achievement testing in the United States. The first facet is the lack of correspondence between test content and intended student outcomes in school districts, and the second facet is "test score pollution." Test score pollution describes instances where test scores for a unit of analysis, such as a class or school, are systematically inflated or deflated without corresponding changes in the content domain that a test is supposed to represent. Test score pollution is associated with standardized achievement tests; however, authentic assessments may be even more susceptible to test score pollution. First, the concept of validity is examined, and second, particular attention is focused on the meaning of school achievement. Third, test score pollution is described and research on the problem is evaluated.); James Smith O'Brien, *The Dis-Equalizing Impact of Standardized Testing on Language-Minority Children*, 1994 (maintaining that many students who have limited English proficiency are being given dis-equalized services by schools through inappropriate test screening. The author asserts that schools often use inappropriate standardized instruments to determine the English language fluency of limited English proficient (LEP) and language minority children, and that these instruments often are administered by school employees with little or no knowledge of the child's first language or culture. The interrelationship between test bias, test discrimination, and test fairness also is discussed. The paper concludes that schools need to address the cultural diversity of their student population and ensure that children's language proficiency is evaluated in an unbiased, nondiscriminatory, and fair manner.); Abella Rodolfo, "Achievement Tests and Elementary ESOL Exit Criteria: An Evaluation," *Educational Evaluation and Policy Analysis*, vol. 14, no. 2 (Summer 1992), pp. 169–74 (examining Dade County (Florida) Public Schools' process for exiting students with limited English proficiency from the English for Speakers of Other Languages (ESOL) Program. Results with 500 students with limited English proficiency show that exiting students performed successfully in regular classrooms. The Stanford Achievement Test discriminated between students with limited English proficiency and English-fluent students' performance on language-related test components); Else V. Hamayan and Jack S. Damico, *Limiting Bias in the Assessment of Bilingual Students*, (Austin, TX: Pro Ed, 1991).

30 Rossell and Baker, *Selecting and Exiting Students*, at 606.

31 Rossell and Baker, *Selecting and Exiting Students*, at 607.

32 Rossell and Baker, *Selecting and Exiting Students*, at 606–07. *See also* Otero v. Mesa County Sch. Dist., 408 F. Supp. 162, 165–66 (D. Colo. 1975), *vacated*, 568 F.2d 1312 (10th Cir. 1977). The court here concluded that a clear relationship between low academic achievement and the English language deficiency of students must be demonstrated before a court could mandate special language services for language minority students. In absence of showing of this relationship, low academic achievement could be related to showing of other variables (e.g., socioeconomic background); therefore merely showing that Spanish was the home language was not enough to require a school district to provide special language assistance.).

student should be placed in an alternative language program.[33]

Researchers also cite problems with relying on standardized testing as a sole means of assessing and placing students with limited English proficiency.[34] For instance, one author notes that:

> All professionals involved in the assessment process need to be aware that their beliefs and perceptions may not match those of the population they serve." Because most cognitive, language, and academic measures are developed using standards of the majority English-speaking culture, their use with students who are not from that culture may be inappropriate. It is, therefore, imperative that the evaluation team collect the majority of their information about the student in other ways, such as through interviews, observations, and approaches such as dynamic assessment, which has shown promise for use with minority students. [citations omitted][35]

The Federal courts have supported using standardized tests as only one of several means of assessing students with limited English proficiency. For instance, in the California case of *Teresa P. v. Berkeley Unified School District*,[36] the court held that the evaluation procedures of a Northern California school district were not in violation of the mandate of section 1703(f) of the Equal Educational Opportunities Act.[37] The court noted that the standardized examination used by the district in placing students with limited English proficiency was only one of several formal devices used for identification of and service delivery to students with limited English proficiency.[38]

A third problem with standardized testing is it often does not take into account students' relative language proficiency. The relative language proficiency of a student who may be a potential candidate for a special instruction program refers to the student's proficiency in his or her native language as compared to the student's proficiency in English. It is critical for this determination to be made by the school before a student is removed from the school's regular education program.[39] This is so because the student's English proficiency may be *higher* than his or her proficiency in the native language. Moreover, it is impossible to make this determination on the basis of the

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33 Rossell and Baker, *Selecting and Exiting Students*, at 607. Rossell and Baker also argue that because students who know little English may guess at a large proportion of the questions on a standardized test, the test score has a large inherent error component, which could lead to the misclassification of students. *Id.*

34 For instance, tests may be biased and if used as the sole means of assessing students may result in discriminatory decisions. *See* Arthur R. Jensen, *Bias in Mental Testing* (New York: The Free Press, 1989), p. 607 (noting that bias in testing is ". . . a form of error: it is error of measurement (unreliability) and error of prediction (invalidity) that are related to the individual's group membership. In the most general terms, bias exists when [the employment of test scores as a measure of success or accountability of schools, or as a means of test placement] discriminates individuals differently than does the criterion of performance.").

35 Waterman, "Assessing Children for the Presence of a Disability," p. 13 (citing C. Hoy and N. Gregg, *Assessment: The Special Educator's Role* (Pacific Grove, CA: Brooks/Cole, 1994) and C.S. Lidz, ed., *Dynamic Assessment: An Interactional Approach to Evaluating Learning Potential* (New York: Guilford, 1987)).

36 724 F. Supp. 698 (N.D. Cal. 1989).

37 *Id.* at 712.

38 *Id.* at 715–16.

39 *See* Rossell and Baker, *Selecting and Exiting Students*, at 610 (noting that: "Illustrative of the problem is a study of relative language proficiency among Hispanic students by Duncan and De Avila. A majority (54) of the 101 students classified by the Language Assessment Scales (LAS) as limited or non-proficient in Spanish in their sample were also classified as limited or non-proficient in English. Of the 96 students found to be limited or non-proficient in English, less than (42) were found to be proficient Spanish speakers. Overall, more than half of the entire sample was classified by the LAS as limited or non-proficient in both Spanish or English." (citing S. Duncan and E. De Avila, "Relative Language Proficiency and Field Dependence/Independence," paper presented at the annual meeting of TESOL, Boston, 1979).). *See also* F. Howard Nelson, *The Assessment of English Language Proficiency: Standards for Determining Participation in Transitional Language Programs*, 15 J.L & Educ. 83 at 103 (Winter 1986).

home language survey or through the use of standardized testing alone.

Another major problem identified in recent educational research literature is the use of standardized testing without the use of some other means of evaluation.[40] Finally, the failure to consider a student's relative proficiency in English and his or her home language may lead to misclassification of that student. Despite the critical importance of the relative language proficiency test, fewer than 2 percent of all school districts use measures of students' native language proficiency for the assessment of relative language proficiency in placing them in programs.[41] For example, classification procedures in New Mexico call for a standardized test, a language proficiency test, and the use of teacher judgment.[42]

The complexity of testing issues relating to the use of standardized testing to determine relative language proficiency of students with limited English proficiency has resulted in court decisions that, while attempting to ensure appropriate educational practices for such students, have nonetheless failed to account for all potentially important variables associated with testing procedures. For example, in *Aspira of New York, Inc. v. Board of Education*,[43] a case brought by a community group on behalf of all Hispanic children in the New York School District whose language deficiency prevented effective participation in an English schooling context and who could participate effectively in a Spanish language curriculum, the district court developed a language dominance procedure to identify those students eligible for non-English, Spanish language instructional programs.[44] The procedure called for parallel examinations to obtain language proficiency estimates on Spanish and English standardized achievement tests.[45] All students scoring below the 20th percentile on an English language test were given the same or a parallel test in Spanish. Students who scored higher on the Spanish achievement test and Spanish language proficiency test were to be placed in a Spanish-language program.[46] These procedures assumed adequate reliability and validity for the language and achievement tests administered. Such an assumption was and still is highly questionable.

Education experts recognize the use of standardized tests may operate to discriminate against many different groups of students including students with limited English proficiency in education program placement.[47] They suggest means of eliminating the discriminatory effects of standardized testing.[48] Here, as elsewhere with assessment instruments used by the schools, the key is *proper* implementation and development of the instrument. The standardized test can be an accurate measurement of a student's need for placement in a language remediation program only with quality controls in place to ensure that it is developed and implemented properly.

Among the suggestions of educational experts for using standardized tests in a nondiscrimina-

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40 "If placement tests are to be routinely used with LEP children, then school administrators must be made aware of the limits to predictability in tests designed for one language group and then used for placement purposes in other groups." James Brian Smith, "The Disequalizing Impact of Standardized Testing on Language Minority Children," (EDRS, 1994), p. 11.

41 Barona and Garcia, eds., *Children at Risk*, p. 29 (citing M. Young et al., *The Descriptive Phase Report of the National Longitudinal Evaluation of the Effectiveness of Services for Language Minority/Limited English Proficient Students* (Arlington, VA: Development Associates)).

42 Ibid., p. 30.

43 394 F. Supp. 1161 (S.D.N.Y. 1975).

44 *Id.* at 1162.

45 *Id.*

46 *Id.* at 1166.

47 *See*, U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment*, pp. 19, 23.

48 *See* ibid. pp. 28–32.

tory way are the development of valid selection procedures assisted by the use of new conceptual frameworks.[49] For example, the interpretation of test results for students with limited English proficiency must take into account a number of factors that are not necessary in the interpretation of their English-speaking peers' test results.[50] Educational experts also agree that "students are often inappropriately placed or they are identified as intellectually inferior because their performance on English language achievement tests or other content tests is reduced by their limited understanding of the language.[51]

Problems Relating to Teacher and Staff Judgment

Teacher and staff judgment also play a major role in schools' decisions regarding students with limited English proficiency. At least two-thirds of students were screened by procedures that include staff judgment, and there is widespread use of teachers' recommendations in the procedures for exiting from the bilingual program.[52] Inadequate teacher assessments are associated with inappropriate placement of students with limited English proficiency in remedial or special education.[53] According to educational experts, some of the major reasons why teacher assessments can result in inappropriate placements for students with limited English proficiency are: (1) teachers' lack of knowledge of "the special characteristics minority students bring to the testing situation" and of the "normal processes of second language development,"[54] (2) teachers' referral of students with limited English proficiency without consideration of linguistic or cultural differences, and (3) problems in the interactions between educators, such as special education assessors and bilingual education specialists.[55]

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49 Barona and Garcia, eds., *Children at Risk*, p. 30.

50 Else V. Hamayan and Jack S. Damico, *Limiting Bias in the Assessment of Bilingual Students*, (Austin, TX: Pro Ed, 1991), p. vii. These factors include language dominance, language transfer, and cultural and interactional differences.

51 Ibid.

52 Xavier Briand, "Teacher Observations Key in Bilingual Assessment," *Education Daily*, vol. 29, no. 64 (Apr. 3, 1996), p. 5.

53 At the 1996 annual meeting of the Council for Exceptional Children, bilingual education specialist Sandra Fradd, an associate professor of education at the University of Miami, and Rosalie Gallo, a bilingual specialist in Dade County, Florida Public Schools noted that a major problem is that many teachers are not knowledgeable enough about the stages of students' language development. As a result they often mislabel as disabled those who are in the process of learning English as a second language. According to Fradd, teachers too often mistakenly rely on formal, rigid methods to identify and teach students, instead of using their professional judgment. She noted that "nobody is training teachers to look for these things." Xavier Briand, "Teacher Observations Key in Bilingual Assessment," *Education Daily*, vol. 29, no. 64 (Apr. 3, 1996), p. 5.
Fradd also noted that a "zone of risk" occurs when a student's strides in English fail to keep pace with the deterioration of his or her native language. As a result, the student struggles with comprehension, organization, and usage of both languages, omitting sounds and making grammatical errors that resemble the symptoms of learning disabilities or mild mental retardation. These problems often occur when students are brought from bilingual programs into regular education after reaching just the second of four phases of English language development. Ibid.
Fradd noted further that literacy development is one of several factors a good diagnostician will consider during student background checks and an informal assessment. Other indicators used in appropriate assessment procedures might include information on the students' length of stay in the United States, his or her socioeconomic status, and prior school experience. Fradd acknowledged, however, that these informal assessment procedures, while providing the flexibility required for accurate and appropriate assessment and evaluation may be enhanced when used in combination with more traditional evaluation tools such as standardized tests. Ibid.

54 Else V. Hamayan and Jack S. Damico, *Limiting Bias in the Assessment of Bilingual Students* (Austin, TX: Pro Ed, 1991), p. vii.

55 Ibid.

Overcoming Barriers to Neutral and Nondiscriminatory Identification, Assessment, and Placement of Students with Limited English Proficiency

In determining which educational approach to take in complying with the mandates of *Lau* and State and Federal education policy, school districts must rely on procedures for assessing each student's level of language skill in English and the native language. To guarantee appropriate placements assessment procedures for identification and placement must 1) clearly define the target group, 2) account for relative levels of skill in both languages, and 3) utilize more than one method or instrument for evaluation.[56]

Various researchers and practitioners have attempted to address the complexities involved in resolving some of the more difficult issues relating to the development of appropriate standards for screening and diagnostic practices for students with limited English proficiency. For example, one commentator has stated that:

> [t]he strongest regulatory statement ever set forth on testing bilinguals exists in Chapter 13 of the latest *Standards for Educational and Psychological Testing*. . . . That chapter, "Testing Linguistic Minorities," surpasses everything that has ever been published as a regulation, or a law, or a court decision on this matter.[57]

This commentator, a professor at the University of California at Davis, states further that this chapter may be summarized in the following propositions:

> (a) For a bilingual, any test that relies on English becomes confounded since in unknown degrees it becomes an English test; (b) Bilingualism is a complex phenomenon involving all aspects of literacy, communication, and social functions; (c) Mental processing in the weaker language may be slower, less efficient, and less effective; (d) Language *background*, not just language proficiency, must be taken into account in every facet of assessment such as test development, selection, administration, and interpretation; (e) Tests developed without accounting for language differences are limited in their validity and on how they can be interpreted; (f) Psychometric properties do not translate from one language to another and hence translations do not work; (g) Measuring proficiency in [the first language and the second language] "may be necessary" to designing instructional programs; (h) Proficiency in English should be determined along several dimensions; (i) The ability to speak English in naturalistic situations may not predict the ability to learn academic material in English; (j) Assessment of nonnative speakers of English will take extra time (more tests and observations); (k) Particularities of cultural background can lower test performance; (l) Special training for bilingual communication in testing and communication may be profitable and beneficial; and (m) tests must be proven to be equivalent if they are formulated in [the first language and the second language].[58]

In identifying best practices for school psychologists in the assessment of language proficiency in bilingual children, another commentator has stated:

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56 *See generally* U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment*, May 1993; Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, 1992); Else V. Hamayan and Jack S. Damico, *Limiting Bias in the Assessment of Bilingual Students* (Austin, TX: Pro Ed, 1991); Judith Lessow-Hurley, *A Commonsense Guide to Bilingual Education* (Alexandria, VA: Association for Supervision and Curriculum Development, 1991); Andres Barona and Eugene E. Garcia, eds., *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity*, (Washington, D.C.: National Association of School Psychologists, 1990); Christine Rossell and Keith Baker, *Selecting and Exiting Students in Bilingual Education Programs*, 17 J.L. & Educ. 589 (1987).

57 Richard A. Figueroa, "Best Practices in the Assessment of Bilingual Children," in Alex Thomas and Jeff Grimes, eds., *Best Practices in School Psychology-II* (Washington, DC: National Association of School Psychologists, 1990), p. 94 (hereafter cited as Figueroa, "Best Practices in the Assessment of Bilingual Children").

58 Figueroa, "Best Practices in the Assessment of Bilingual Children," p. 94.

Among the practices that are recommended are parent, children, and teacher interviews to explore the history of language use, language development, and language background. Informal questionnaires may be helpful in collecting language-background data. . . . It is also important to collect language samples during informal situations (e.g., play and conversations) as well as in more formal academic tasks (e.g., classroom discussion). . . .

Overall, language proficiency tasks should be interpreted taking into consideration the following issues:

- As children are exposed to [a second language], they may demonstrate a loss of receptive and expressive language skills in [their first language]. Thus, less developed skills in [the first language] may be due to the normal second language acquisition process and not to language disabilities.
- Bilingual students' proficiency may vary depending on the context in which language is being used. For example, some bilingual children are well able to communicate in both languages in interpersonal communication but are more proficient in [the second language] in academic situations.
- Language proficiency includes Basic Interpersonal Communication Skills (BICS) and Cognitive Academic Language Proficiency Skills (CALPS). BICS entails the use of language during context-embedded, interpersonal situations whereas CALPS involves the use of language during context-reduced, academic situations. The [second language] acquisition research indicates that BICS takes approximately 2 years to develop in [the second language] whereas CALPS takes 5 to 7 years. Language proficiency data based on tasks that assess BICS (e.g., observations during play activities, language samples during informal conversations) should not be used to determine bilingual children's ability to use language in cognitively demanding academic situations. CALPS should be determined through tasks that assess bilingual students' abilities to use language in academic situations (e.g., observations of academic behaviors, collection of language samples in academic situations).[59]

Finally, this commentator also notes bilingual children can develop high levels of literacy and proficiency in both languages, and high levels of proficiency in the first language can facilitate learning the second language "because of the common underlying proficiency or interdependence across languages which facilitates the transfer of knowledge from one language to the other."[60]

At the broader, institutional level of Federal and State policymaking, indications for increasing the quality of educational programs for students with limited English proficiency include some of the following. First, educationally sound, uniform national identification and assessment procedures based on a clear definition of the target group would reduce the problem of inappropriate placements for students in need of a special instruction program to address English language deficiencies. Moreover, such a procedure would be useful to schools in determining which educational approach should be implemented in the instruction program. DOEd could establish such a procedure through new guidelines. These guidelines should be developed based on the advice of students, parents, teachers, school administrators, and educational and civil rights experts from across the country.

Generally, schools in coordination with student's families should consider the option of placing students in a special instruction program designed to improve the student's ability to succeed in an English-only classroom environment after appropriate evaluations including teacher assessments and language proficiency test results indicate this placement. Such procedures must begin with a clear definition of the target group for assistance. Although the Bilingual Education Act provides a *legal definition* for the term "limited English proficiency" an *educational* definition is required. It is important to note the distinction between the terms "limited English proficient" and *children who are dependent on a language other than English to communicate.* A

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59 Emilia C. Lopez, "Best Practices in Working with Bilingual Children," in Alex Thomas and Jeff Grimes, eds., *Best Practices in School Psychology-III* (Washington, D.C.: National Association of School Psychologists, 1995), pp. 1113–14.

60 Ibid., p. 1112 (citing J. Cummins, *Bilingualism and Special Education: Issues in Assessment and Pedagogy* (San Diego, CA: College-Hill, 1984)).

definition of "limited English proficiency" must be understood in terms of its relationship to full English language proficiency.[61]

The key elements of several suggested valuative approaches from experts reflect agreement. For example, many experts agree that in determining language proficiency school personnel must assess all four language skills: speaking, reading, writing, and understanding/listening.[62] Moreover, the operational definition of language proficiency must address proficiencies in *both* the native, non-English language and the English language.[63] This is extremely important because students with limited English proficiency may or may not be proficient in their native languages.[64] Their ability to communicate in their native language may have a major impact on their ability to learn English and their ability to learn new content in either language.[65]

Utilizing Neutral and Nondiscriminatory Diagnostic and Screening Procedures: Civil Rights Implementation, Compliance, and Enforcement Activities

The identification of students with limited English proficiency is done largely by State and local authorities.[66] The first step in identifying whether a student has limited English proficiency is to define limited English proficiency. However, because local education agency participation in Title VII programs is voluntary, only those local education agencies receiving grants are required to establish specific definitions/criteria and sound methodology to identify students who have limited English proficiency.[67] There are no federally recommended procedures to identify students with limited English proficiency.

OCR's Policy Guidance on Identification, Assessment, and Placement of Students with Limited English Proficiency

OCR's implementing regulations for Title VI do not contain a provision addressing the identification, assessment, and placement procedures for students with limited English proficiency.[68] However, OCR has issued some policy guidance related to this issue. OCR first addressed the issue of identification, assessment, and placement of students who have limited English proficiency in its May 1970 memorandum, which states lack of English language skills is not a valid rationale for placing a student in special education.[69] In this memorandum, OCR concluded that Title VI is violated if national origin minority students are misassigned to classes for the mentally retarded

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61 Ibid.

62 Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, 1992), p. 6.

63 Ibid.

64 Ibid.

65 Ibid.

66 U.S. Department of Education, Office of the Secretary, *The Condition of Bilingual Education in the Nation: A Report to the Congress and the President*, June 30, 1992, p. 9.

67 Ibid.

68 *See* 34 C.F.R. § 100 (1996).

69 Angela D. Martinez, National *Lau* Facilitator, U.S. Department of Education, Office for Civil Rights, telephone interview, June 24, 27, 1996 (hereafter cited as Martinez interview) (referring to J. Stanley Pottinger, Director, Office for Civil Rights, memorandum to School Districts with More than Five Percent National Origin-Minority Group Children, "Identification of Discrimination and Denial of Services on the Basis of National Origin," May 25, 1970 (hereafter cited as May 25, 1970

because of their lack of English skills.[70] Thus, the policy set forth in the May 1970 memorandum can be interpreted to make failure to identify and place students who have limited English proficiency properly a violation of Title VI.

OCR issued additional policy guidance on identification, placement, and assessment procedures in its September 1991 memorandum, which addresses the issue very briefly in explaining OCR's rules for determining whether a school district needs a formal program for students who have limited English proficiency. The memorandum states that "[r]ecipients should have procedures in place for identifying and assessing LEP students. As the December 1985 memorandum stated, if language minority students in need of an alternative language program are not being served, the recipient is in violation of Title VI."[71] The memorandum continues, "[t]he type of program necessary to adequately identify students in need of services will vary widely depending on the demographics of the recipients' schools."[72] Thus, OCR's policies indicate that a State or local school district's failure to have procedures for the identification, assessment, and placement of students who have limited English proficiency constitutes a violation of the antidiscrimination provisions of Title VI.[73]

Although OCR has issued the above policies that provide broad guidance on identification, assessment, and placement, the closest that OCR has come to issuing official guidelines addressing identification, assessment, and placement procedures came in the form of the 1975 *Lau* Remedies and the 1980 Notice of Proposed Rulemaking. Since the withdrawal of the Notice of Proposed Rulemaking in 1981, OCR has not relied on the recommendations contained therein, but, as noted above, many State and local education agencies continue to follow the procedures it recommended.

In general, OCR policies seek to ensure that school districts, in fashioning adequate assessment procedures for identification, assessment, and placement of students with limited English proficiency, emphasize four areas of language skills: speaking, reading, writing, and understanding.[74] OCR develops its policies based on the notion that each of these modalities plays an important role in making accurate identification, evaluation, and placement decisions for students with limited English proficiency.[75]

In 1995, OCR drafted policy guidance detailing requirements for fairness in testing procedures.[76] This policy guidance has been issued in draft form. It remains an internal document that has

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memorandum) in stating that "Teachers themselves will tell us 'no we didn't consider language,' 'no, these test results aren't valid,' and the kids are usually put into learning disabled, communication disorder, speech and language, labelled with those kinds of disabilities. It goes back to the 1970 memorandum which says that you can't place students in what they called at that time, classes for the mentally retarded on the sole basis of lack of English language skills. Lack of English language skills is not a valid rationale for placement in special education."). Ibid., p. 6.

70 35 Fed. Reg. 11,595 (1970).

71 Michael L. Williams, Assistant Secretary for Civil Rights, memorandum to OCR Senior Staff, "Policy Update on Schools Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP Student)," Sept. 27, 1991 (hereafter cited as September 1991 memorandum), pp. 9–10.

72 Ibid.

73 *See* ibid., pp. 9–10.

74 Martinez interview, p. 10.

75 *See* Angela Martinez, National *Lau* Facilitator, Denver Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, June 24, 27, 1996, pp. 6–10 (hereafter cited as Martinez interview); Alice Wender, Program Manager, D.C. Enforcement Office, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., July 18, 1996, p. 1 (hereafter cited as Wender interview).

76 Norma V. Cantú, Assistant Secretary for Civil Rights, "Fairness in Testing: An Overview," Mar. 14, 1995 (hereafter cited as March 1995 draft memorandum).

heretofore been disseminated only to OCR staff. The memorandum does not offer any guidance to OCR staff in the specific context of conducting *Lau* compliance reviews. However, the draft guidance does provide a thorough recitation of disparate treatment and disparate impact analysis with respect to Title VI generally. It provides a thorough treatment of the application of these legal theories to a wide range of associated issues. For example, with respect to disparate impact, the draft guidance addresses such testing-related issues as testing validity, including acceptable types of validity evidence; statistical relationships between test performance and the performance measured; evidence of reliability required; and guidelines consistent with professional standards.[77] In addition, the draft guidance provides standards for evaluation of less discriminatory alternative instruments in the case of a finding of discrimination of disparate impact resulting from the use of a testing instrument.[78]

Partnership Process

OCR's Kansas City Enforcement Office (formerly Region VII) offers guidance to school districts on *Lau* compliance on identification and assessment procedures through the use of self-evaluation instruments in its PAR review pilot program. The identification section in that office's "District Assessment Guide" asks school districts the following questions:

1) Are the district's procedures effective in identifying all students who have a primary or home language other than English?

2) Have staff who administer the district's identification procedures received special training on these procedures?

3) Are district staff knowledgeable of the procedures for identifying students who have a primary or home language other than English?

4) Do the district's procedures for initially identifying students who have a primary language other than English determine:

   a. Whether the student speaks a language other than English?

   b. Whether the student understands a language other than English?

   c. Whether the student's language skills have been influenced by a language other than English spoken by someone else, such as a grandparent, babysitter, or other adult?

5) Do staff who work directly with parents and students in the identification of students who have a primary or home language other than English speak and understand the appropriate language(s)?

6) Is documentation regarding each student's primary or home language maintained in student's files?[79]

Most of the questions contained in this section on identification in the "District Assessment Guide" are not framed with enough precision. For example, the question, "Are the district's procedures effective in identifying all students who have a primary or home language other than English?" does not define the term "effective" nor does it offer any specific criteria for what would constitute "effective" procedures. In addition, although the use of the rating system-type questions may make the guide more time effective and generally "user-friendly" to school officials completing it, this may be too superficial as a means of elucidating key information about the level of knowledge possessed by school officials on the procedures themselves.

Although the questionnaire contained in the "District Assessment Guide" could be improved upon with respect to the specificity of some of its questions, it nonetheless provides an innovative technique for conducting factfinding activities on

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77 Here, the draft guidance cites to three sources: APA Standards; the Code of Fair Testing Practices; and EEOC Guidelines. It appears that OCR seeks to rely on a range of legal and educational resources in supporting its analytical framework. Ibid., p. 8.

78 March 1995 draft memorandum, pp. 3–12.

79 Ibid., pp. 1–3.

a school district's *Lau* identification and assessment procedures. In addition, it provides a valuable opportunity for the school district to conduct its own examination of its procedures for identification and assessment. As such, the PAR review process reflects a useful means of implementing OCR's *Lau* policies for assessing school district programs.

Investigative Plans, Training, and Technical Assistance Materials

Investigative plans prepared by regional offices in conducting specific *Lau* compliance reviews have addressed identification and assessment. It appears that OCR has disseminated these documents throughout headquarters and regional offices. For example, at least one of the investigative plans for a specific compliance review conducted in Region V states that "[t]his Investigative Plan has been approved by headquarters and may be used as a guide for preparing *Lau* reviews."[80] The document provides specific questions to be answered by OCR staff when investigating whether a district has identified and assessed students with limited English proficiency properly. However, this document is dated February 26, 1987. It appears that OCR has not issued any investigative plans or policy letters addressing identification and assessment procedures in conducting *Lau* compliance reviews since the 1980s.

Elsewhere, OCR staff has produced informal training materials for staff conducting Title VI/*Lau* compliance investigations which address identification and assessment procedures for students with limited English proficiency. For example, one such document provides a guide for investigators that states:

> OCR's September 1991 memorandum states that a district should have procedures in place for identifying LEP students to ensure that all language-minority students who are unable to participate effectively in the regular instructional program are receiving alternate language services. Thus, such procedures should be designed and implemented to ensure that a district identifies all language-minority students who are unable to speak, read, write, and understand the English language.[81]

This undated "non-official document" as OCR terms it, provides useful guidance on identification and assessment procedures for OCR staff conducting Title VI/*Lau* compliance reviews. It is particularly helpful in characterizing identification and assessment as two distinct steps in a process. This document emphasizes that identification is the first step in which the school district seeks to determine the potential pool of students who are limited English proficient. Assessment procedures reflect the second step in the process, in which the school administers various instruments such as tests of oral and written language proficiency and requires teacher recommendations in an effort to determine placement.

Technical assistance materials prepared by OCR provide a variety of useful information to States and local school districts on this important aspect of their education program implementation. Such materials are prepared by both headquarters and regional OCR offices. These materials support OCR efforts in conducting compliance reviews and monitoring.[82] In addition, OCR relies on such materials in conducting proactive activities such as conferences, workshops, and meetings where identification and assessment procedures often are important topics for discussion.[83] These proactive efforts provide an opportunity for OCR to engage in information sharing on this

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80 *See* Alicia Coro, Acting Assistant Secretary for Civil Rights, to Regional Civil Rights Directors, Regions I–X, re: Investigative Plan for Title VI *Lau* Reviews, Feb. 26, 1987 (Policy Codification Index Doc. No. 00026).

81 U.S. Department of Education, Office for Civil Rights, Nonofficial document on compliance reviews regarding the provision of services to limited-English proficient (LEP) students.

82 Alice Wender, Program Manager, D.C. Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, July 19, 1996, p. 5 (hereafter cited as Wender interview).

83 Wender interview, p. 5.

topic with a variety of key individuals, including education experts and representatives from civil rights advocacy and parent groups.[84]

OCR's Findings With Respect to Identification, Assessment, and Placement of Students with Limited English Proficiency

The principal problem OCR has identified with schools' procedures has been poor implementation. For example, OCR has addressed severe problems with misclassification of students with limited English proficiency into special education programs. In one school district, OCR has sought to remedy a consistent failure on the part of school personnel to discontinue the practice of referring large numbers of Native American students for special education classes. OCR has been monitoring this school system for several years.[85]

Likewise, OCR still finds school districts that are implementing the home language survey in a discriminatory manner. For example, OCR's Denver Enforcement Office (formerly Region VIII) has discovered that one New Mexico school district provides special language services only to students with Hispanic surnames who have recently arrived from Mexico.[86] This practice denies the reality that many students with limited English proficiency may be members of families living in the United States for generations. For such students, family members such as parents and grandparents may be monolingual speakers of languages other than English.

A review of OCR's letters of findings from the past 5 years reveals that OCR enforcement activities such as compliance reviews and complaint investigations frequently address issues associated with identification and assessment procedures.[87] In general, letters of finding addressing

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84 Wender interview, p. 5.

85 Martinez interview, p. 4. In discussing a New Mexico school district's failure to achieve *Lau* compliance, Ms. Martinez stated that: "They were willing to voluntarily enter into a very extensive agreement after we'd monitored them for 3 years. Their population includes over 1,500 Native American LEP students. What we found when we went onsite was that they didn't have an alternative language program, particularly at the secondary school level. The district was referring these students inappropriately for special education (i.e., a dumping ground for kids). So we cited them in basically all areas after doing an extensive review. We monitored them. We gave them technical assistance resources. We sent a number of monitoring letters. We went onsite to provide them technical assistance. We helped by going onsite and doing presentations. We put them in touch with the State department of education there, we put them in touch with the DAC [Desegregation Assistance Center] and the Multifunctional Resource Center, and the Evaluation Assistance Center West and the Bueno Center. The end result was that they did not do what they needed to do for the kids." Ibid.

86 Martinez interview, p. 11 (stating that: "A lot of times . . . administrators and staff don't understand that people can be here for generations and can still be limited English proficient. For example, in New Mexico, in Albuquerque, a lot of times they were only serving Hispanic surname kids who were straight from Mexico, rather than those students who may have been here for generations but were still limited English proficient.").

87 *See generally* Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Otis Falls, Superintendent, North Franklin School District, Connell, WA, re: Case No. 10945010, Mar. 13, 1996; M. Arnold Chavez, Regional Director, Region VIII, Office for Civil Rights, U.S. Department of Education, to Steven H. Peterson, Superintendent, Washington County School District, St. George, UT, re: Case No. 089445022, Nov. 8, 1995; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Pam Carnahan, Superintendent, Sedro Woolley School District, Sedro Woolley, WA, re: Case No. 10935003, Oct. 1, 1993; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Jim B. Hensley, Superintendent, Kansas City Unified School District #500, Kansas City, KS, re: Case No. 07925004, Jul 29, 1993; Cathy H. Lewis, Regional Director, Region VIII, Office for Civil Rights, U.S. Department of Education, to Raul Bejarano, Superintendent, Nogales Unified School District #1, Nogales, AZ, re: Case No. 08935002, May 25, 1993; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Leslie Wolfe, Superintendent, North Marion School District No. 15, Aurora, OR, re: Case No. 10925002, Sept. 2, 1992; Archie B. Meyer, Sr., Regional Director, Region IV, Office for Civil Rights, U.S. Department of Education, to Garry W. Norris, Superintendent, Indian River County School District, Vero Beach, FL, re: Case No. 04–92–5002, July 24, 1992; Taylor D. August, Regional Director, Region VI, Office for Civil Rights, U.S. Department of Education, to Arthur Steller, Superintendent, Oklahoma City Public Schools, Oklahoma City, OK, re: Case No. 06911152,

identification and assessment procedures offer clearly written, strong support for the positions OCR takes on compliance. In addition, the letters of finding addressing this issue provide detailed descriptions of the procedures undertaken by the school district. Such descriptive narrative is important because it enables OCR staff to maintain a sound basis for its compliance analysis and to communicate effectively with the school district on compliance related issues. For example, OCR's New York Enforcement Office (formerly Region II) conducted a compliance review of a New Jersey school district in which it concluded that:

[T]he District is implementing an effective program for LEP students. It has developed and implemented procedures which result in the identification of all LEP students. The District has articulated an overall approach to provide education programs for LEP students and to coordinate the programs for LEP students to ensure that each of the students has an opportunity to learn English and to participate effectively in the District's education program. The District's alternative language program is designed to meet the needs of LEP students as they progress from one level of English proficiency to another. OCR has further determined that staff assignments at all levels are sufficient to implement the alternative language program. OCR has determined that the District is monitoring its program for LEP students to ensure the program's effectiveness.

Finally, the District's criteria for determining when LEP students are no longer in need of alternative educational programs satisfy the requirement set forth in the May 25th Memorandum, which states "... the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track." OCR has determined that the exiting of students from the program is based upon a valid prediction that these students will achieve at or above the level of their counterparts who do not have English language deficiencies.[88]

OCR based this concluding statement on a detailed presentation of the identification and assessment procedures undertaken by the school district. This presentation describes the school district procedures for assessing the four components of language proficiency (reading, writing, speaking, and comprehension).[89] The detailed nature of the presentation on the issue of identification and assessment serves to support the analysis on which OCR based its compliance decision in this letter.

June 25, 1992.

88 Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Joseph Kreskey, Superintendent, Edison Township Public School District, Edison, NJ, re: Case No. 02-91-5001, July 7, 1992, p. 14 (hereafter cited as "Kuebler LOF, 7/7/92").

89 In describing the school district's procedures for identification and assessment the LOF states that: "[p]ursuant to the District's identification process, if students score above 20 on the ORS but do not have records, a District reading specialist administers achievement tests to determine the student's proficiency in reading and writing. The Pre-Academic Learning Assessment (PAL), a locally normed test for kindergarten students and the Comprehensive Test of Basic Skills (CTBS-4 Survey) is used for grades one to eight. For grade nine, the New Jersey Early Warning Test (EWT) is used and the New Jersey High School Proficiency Test (HSPT) is used for the tenth through twelfth grades. Students who meet MLP standards on the achievement tests are enrolled in a regular program of instruction. Students who rate below 20 on the ORS or above 20 but fail to meet the established MLPs on the achievement tests are further assessed by an ESL teacher with a NJSED approved language test. For grades K-8 the Language Assessment Battery (LAB) is used while for grades 9-12 the Maculaitis Assessment Program (MAC) is used. Students who do not meet NJSED established cut-off scores on the LAB or MAC are enrolled in an alternative language program and basic skills instruction (BSI) as appropriate for their language group, proficiency and grade level. Students who meet State LAB or MAC cut-offs are scheduled for BSI for the skill area in which they do not meet District MLPs.
"OCR's investigation further revealed that the language dominance of pupils enrolled in the District's Gujarati, Korean, Mandarin, and Spanish bilingual components is ascertained through an informal screening process. The assessment is conducted by a certified bilingual or bilingual/ESL teacher and focuses on two aspects of language use: (1) the frequency of use of one language compared to the frequency of use of another and/or (2) the proficiency with which the two languages are spoken. The results of this screening process are used in planning learning activities." Ibid., pp. 4-5.

Summary

In general, OCR conducts a progressive and innovative *Lau* program with respect to compliance standards and enforcement activities. For example, in fashioning compliance standards on assessment procedures of students with limited English proficiency, OCR has sought to ensure the use of multiple criteria to avoid the problems with racial or ethnic bias in standardized testing. In conducting enforcement activities, OCR continues to experiment with creative approaches such as the partnership review and the use of self-assessment guides to determine whether school districts are meeting compliance standards on such issues as identification and assessment.

However, OCR's Title VI implementation is lacking because its Title VI regulations do not address identification, assessment, and placement procedures specifically in the *Lau* context. Moreover, OCR's policy guidance has not been altogether clear in providing school districts guidance on identification, assessment, and placement procedures. This is particularly true with respect to the issue of whether school districts with purportedly small populations of students with limited English proficiency must develop and implement "formal" procedures for identification, assessment, and placement. A related issue is clarifying what constitutes a "formal" procedure versus an "informal" one. OCR has not provided school districts with clear policy guidelines to promote effective assessment procedures for identification and placement. In addition, although OCR endorses the use of multiple criteria for meeting Title VI compliance standards generally, OCR has not issued any *Lau* policy guidance specifically emphasizing the importance of multiple measures for crucial screening procedures such as assessments for program placement and exit criteria. OCR has also not provided any policy guidance on case law interpreting Title VI on LEP issues relating to identification, assessment and placement since it issued the September 1991 memorandum.

Chapter 7

Structuring Education Programs to Serve a Diverse Student Population

Maintaining a Primary Objective to Place Students in Regular Classes or Core Academic Curriculum

Background

Many legislators, policymakers, educators, and advocates have urged schools to maintain a primary objective to place students with limited English proficiency in regular education classes to the greatest extent possible to eliminate segregation. Research findings demonstrate that the segregation of students with limited English proficiency continues in public elementary and secondary schools.[1] In 1968 when the Bilingual Education Act was passed, 65 percent of Hispanic students in elementary school and 53 percent of those in high school were attending predominantly minority educational institutions. By 1976, these figures had increased to 74 percent and 65 percent respectively.[2] At that time, most

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1 *See* Bradley Scott, "The Fourth Generation of Desegregation and Civil Rights," in *Civil Rights in Education: Revisiting the* Lau *Decision* (San Antonio, TX: Intercultural Development Research Association, 1995), pp. 4, 7, 12, and 21. The Desegregation Assistance Center-South Central Collaborative (DAC–SCC) has identified three "generations" of desegregation. The first generation of desegregation occurred between 1954 and 1964 and focused primarily on physical, racial desegregation. The first generation was characterized by attempts to eradicate dual school systems through assignment plans designed to produce racially balanced unitary systems, and to eliminate racial and ethnic stereotypes in the curriculum.

The goal of the second generation, from 1964 to 1983, was to promote equal access to and equal treatment in education programs. During the second generation, Congress passed several laws prohibiting discrimination based on race, color, sex, national origin, or disability. For students with limited English proficiency, the second generation focused on removing language as a barrier to education programs such as gifted and talented programs. Alicia Salinas Sosa, "20 Years After *Lau*: In Pursuit of Equity, Not Just a Language Response Program," *Intercultural Development Research Association Newsletter*, vol. 22, no. 1 (January 1995) (hereafter cited as Sosa, "20 Years After *Lau*").

The third generation of desegregation began in 1983 and continues today. The third generation is characterized by attempts to eliminate resegregation in schools and classrooms, to correct achievement disparities among identifiably different students, to implement culturally relevant curriculum, to adopt varied teaching styles and strategies, to recognize different student learning styles, and to heighten teacher expectations of all students. Bradley Scott, "The Fourth Generation of Desegregation and Civil Rights," in *Civil Rights in Education: Revisiting the* Lau *Decision* (San Antonio, TX: Intercultural Development Research Association, 1995), p. 4 (citing The Network of Regional Desegregation Assistance Centers, *Resegregation of Public Schools: The Third Generation* (June 1989)).

The emerging fourth generation of desegregation is characterized by *de facto* segregation resulting from "the realities of economics, systemic discrimination to some extent, and the 'choices' people make as to where they live." The fourth generation also is distinguished by the increasing number of children in public schools whose first language or home language is not English, and the need for appropriate assessment and placement of students in classes and programs. Ibid., p. 21. *See also* Intercultural Development Research Association, *IDRA Newsletter*, vol. 21, no. 7 (August 1994); Network of Regional Desegregation Assistance Centers, *Resegregation of Public Schools: The Third Generation* (June 1989); Bradley Scott, "In Pursuit of Equity: An Idea Whose Time Has Come," *IDRA Newsletter*, vol. 17, no. 8 (September 1990), pp. 9–12.

2 *See* James J. Crawford, *Bilingual Education: History, Politics, Theory, and Practice* (Los Angeles: Bilingual Educational Services, Inc., 1991), pp. 40–41 (hereafter cited as Crawford, *Bilingual Education*). In 1991–1992, 73.1 percent of Hispanic students, 65.9 percent of African American students, 50.4 percent of Asian American Students, 42.5 percent of Native

Title VII grants were awarded to highly segregated school districts.[3] Moreover, although fewer African Americans attended segregated schools in the late 1970s and early 1980s than in previous decades, "school segregation for Hispanics increased to the point that Hispanics now have the dubious distinction of being not only the most undereducated major group of American children, but also the most highly segregated."[4]

Equal educational opportunity requires schools to eliminate segregation based on race or national origin in education programs.[5] In *Brown v. Board of Education* (*Brown I*), the Supreme Court held that "separate educational facilities are inherently unequal" and that the equal protection clause of the 14th amendment guarantees equality of educational opportunity for all students in the public school system regardless of their race, national origin, or color.[6] As a result of the U.S. Supreme Court's decision in *Brown I*, schools no longer can segregate students on the basis of race, national origin, or color.

The Supreme Court's decision in *Lau v. Nichols* further enhances school districts' obligations to students with limited English proficiency.[7] Writing for the majority, Justice William O. Douglas stated, ". . . there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. . . ."[8] He added, "It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the [Title VI] regulations."[9] *Lau* requires the development and implementation of educational programs that address the language needs of students with limited English proficiency.

Congress has advanced the mandates of *Brown* and *Lau* in civil rights statutes and the Bilingual Education Act.[10] Congress included the Supreme

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American students, and 8.5 percent of white students attended predominantly minority schools. *See* Gary Orfield with Diane Glass, "Asian Students and Multiethnic Desegregation," The Harvard Project on School Desegregation (October 1994).

3 *See* Crawford, *Bilingual Education*, pp. 40–41. Ruben Donato and Herman Garcia, "Language Segregation in Desegregated Schools: A Question of Equity," *Equity and Excellence*, vol. 25, no. 2–4 (Winter 1992), pp. 94–99, 96 (hereafter cited as Donato and Garcia, "Language Segregation").

4 Michael A. Rebell and Anne W. Murdaugh, *National Values and Community Values: Part II: Equal Educational Opportunity for Limited English Proficient Students*, 21 J.L. & Educ 335, 347 (Summer 1992) (hereafter cited as Rebell and Murdaugh, *National Values*) (citing L. Orum, *The Education of Hispanics: Status and Implications* 19 (1986)). *See generally* Keyes v. Denver Sch. Dist. No. 1, 576 F. Supp. 1503 (D. Colo. 1983), *aff'd in part, remanded*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991); *see also* Crawford, *Bilingual Education*; M. Betrays Arias, "Mexican-American Student Segregation and Desegregation in California," in Raymond V. Padilla and Alfredo H. Benavides, eds., *Critical Perspectives on Bilingual Education Research* (Tempe, AZ: Bilingual Press, 1992) (hereafter cited as Arias, "Mexican American Segregation"); Donato and Garcia, "Language Segregation."

5 *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d–7 (1994); Section 1703(f) of the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f) (1994).

6 347 U.S. 483, 495 (1954) (Brown I). *See* U.S. Const., amend. XIV, § 1.

7 414 U.S. 563 (1974).

8 *Id.* at 566.

9 *Id.* at 568.

10 The Bilingual Education Act allows for recipients of funds awarded under the act to maintain programs in which students with limited English proficiency and their English proficient counterparts study together in the same classroom. The act states that bilingual education programs "may include the participation of English-proficient students if such program is designed to enable all enrolled students to become proficient in English and a second language." 20 U.S.C. § 7601(18)(D) (1994).

Court's ban on segregation in the Civil Rights Act of 1964[11] and codified the Court's *Lau* decision in the Equal Educational Opportunities Act of 1974.[12] Thus, Federal education policy has reflected two sometimes conflicting types of concerns, concerns about the segregative effects of certain educational programs and concerns about limited English proficient students' effective participation in schools' education programs.

In maintaining a primary objective to place students in regular classes or core academic curricula to the greatest extent possible, schools are complying with *Brown* and *Lau*. These two important cases provide a framework for making placement in regular classes an important goal in developing education programs for students with limited English proficiency. The Federal courts also have sought to eliminate the segregative effects of school district practices by formulating remedies that place all students in regular classes to the greatest extent possible.[13] In designing desegregation remedies in cases involving students with limited English proficiency, the Federal courts have required the placement of students who are limited English proficient in classrooms with their English-proficient peers; instructional programs appropriate to each student's "cultural and learning characteristics;" and the development of proficiency in a second language.[14] A recent Federal district court decision demonstrates the influence of the earlier Supreme Court cases:

> The goal of language remediation programs is to integrate Spanish-speaking students into the English language classroom. A properly implemented program raises the academic achievement of limited-English-proficient students, thus creating equal educational opportunities for these students. Given these goals, language remediation programs should not isolate their participants from English-speaking children. As much as possible, the program should encourage contact between non-English and English-speaking children. Allowing participation in mainstream academic and extracurricular programs is one manner of achieving this goal (citations omitted).[15]

Maintaining a primary objective of placing students in regular classes also plays an important role in Federal education funding policy. For example, in the legislative history of the Bilingual Education Act, Congress stated that "limited English proficient children and youth face a number of challenges in receiving an education that enable such children and youth to participate fully in American society, including . . . *segregated education programs*."[16]

The U.S. Department of Education (DOEd) has implemented this objective in its regulations. For example, the implementing regulations for Title VI include a prohibition against segregation in any federally funded program.[17] The Title VI reg-

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11 Title IV of the Civil Rights Act of 1964 prohibits segregation. 42 U.S.C. §§ 2000c to 2000c–9 (1994).

12 *See* U.S. Congress, House, Committee on Education and Labor, *Education Amendments of 1974*, 93d Cong., 2d sess., H. Rep. No. 805, *reprinted in* 1974 U.S.C.C.A.N. 4093, 4150.

13 *See generally* People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905 (N.D. Ill. 1994), *subsequent appeal*, 68 F.3d 172 (7th Cir. 1995), *summ. judgment denied*, 1996 U.S. Dist. LEXIS 9530 (N.D. Ill. Jan. 26, 1996), *remanded*, 90 F.3d 1307 (7th Cir. 1996), *and aff'd in part, rev'd in part, remanded*, 1997 U.S. App. LEXIS 7143 (7th Cir. Apr. 15, 1997); 576 F. Supp. 1503.

14 *See* 851 F. Supp. 905; 576 F. Supp. 1503.

15 851 F. Supp. at 1191–92 (citing Castaneda v. Pickard, 648 F.2d 989, 998, 998 n. 4 (5th Cir. 1981). *See also* United States v. Board of Educ., 588 F. Supp. 132, 169 (N.D. Ill. 1984), *cert. denied*, 471 U.S. 1116 (1985); Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 64 (E.D.N.Y. 1978); Coalition to Save Our Children v. Buchanan, 744 F. Supp. 582 (D. Del. 1990).

16 20 U.S.C. § 7402 (a)(5)(A)–(B) (1994) (emphasis added). *See also* Gary Orfield with Diane Glass, "Asian Students and Multiethnic Desegregation," The Harvard Project on School Desegregation (October 1994). On a national level 50 percent of Asian students attend schools where the majority of the students are nonwhite, and 66 percent of African American students and 73 percent of Hispanic students attend such schools. Only 8.5 percent of white students attend such schools. Ibid., p. 15.

17 The regulations also prohibit "criteria or methods of administration which have the effect of subjecting individuals to

ulations state "[a] recipient under any program to which this part applies may not. . . (iii) [s]ubject an individual to *segregation or separate treatment* in any matter related to his receipt of any service, financial aid, or other benefit under this program.[18] OCR also has issued policy guidance on conducting compliance reviews under the *Lau* decision that states, "OCR's inquiry in this area should focus on whether the district has carried out its chosen program *in the least segregative manner* consistent with achieving its stated goals."[19]

The Varying Degrees of Effectiveness of School Programs and Education Policy in Promoting Successfully Integrated Education Programs

Federal civil rights laws require schools to comply with the *Brown* decision's requirements for equal treatment and integration; the nondiscrimination provisions under Title VI; the effective participation requirements of *Lau*; and, if necessary, the remedies for discrimination described in the Equal Educational Opportunities Act. These obligations require schools to strive towards two somewhat conflicting goals: integration and effective participation.[20] However, by maintaining a primary objective to place students with limited English proficiency in regular classes to the greatest extent possible, schools may balance the two competing goals successfully.

Maintaining a primary objective to place students in regular classes to the greatest extent possible is important, because it ensures that students do not remain in segregated programs for their entire academic careers. Although the ultimate goal of Federal policy is integration, this objective acknowledges that immediate regular education placement may not meet the educational needs of students with limited English proficiency. In recognizing the limitations of immediate regular education placement, educators also prevent the harm caused by programs that place too great an emphasis on quick transition. Moreover, this objective recognizes that separation between students with limited English proficiency and their English-speaking peers may be unavoidable to some degree to ensure effective participation for all students. However, in meeting the effective participation requirement, schools must reduce any resulting segregative effects that may impede the ultimate goal of regular education program placement for all students. The fifth circuit in *Castaneda v. Pickard* attempted to resolve this tension by stating that, "the benefits which would accrue to [limited English proficient] students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation."[21]

From a civil rights perspective, maintaining a primary objective to place students in regular classes to the greatest extent possible reflects the crucial remedial importance of both regular education placement and adequate language instruction. Students with limited English proficiency have experienced severe isolation in classrooms that have sought only physical integration or facially "equal treatment" mandated in *Brown v. Board of Education (Brown II)*[22] and Title IV of the Civil Rights Act of 1964.[23] In acknowledging

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discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (1996).

18 34 C.F.R. § 100.3(b)(1)(iii) (1996) (emphasis added).

19 Michael L. Williams, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP Students)," Sept. 27, 1991, p. 10 (emphasis added) (hereafter cited as September 1991 policy update).

20 *See* Donato and Garcia, "Language Segregation," pp. 94–96. *See generally* Crawford, *Bilingual Education*; and Arias, "Mexican American Segregation," p. 402.

21 648 F.2d at 998.

the need for the equal educational opportunity remedy advanced by the "effective participation" requirement of *Lau* and the "appropriate action" requirement of the Equal Educational Opportunities Act, schools are undertaking more comprehensive remedial efforts to avoid language segregation within a physically integrated classroom.[24] As one expert has stated,

> Language policy in this country has developed as a patchwork quilt of [F]ederal laws, regulations, guidelines, and court decisions centered around student rights and school district responsibilities. Over the past two decades, governmental institutions have translated *Brown's* mandate of *equal treatment* for racial minorities into a mandate of *effective participation* for linguistic minorities. For the first group, equality is *same*, for the second it is *different*. The precise nature of that difference has become the focus of policy debate.[25]

School districts are meeting their obligations under *Brown*, *Lau*, and the Equal Educational Opportunities Act with varying degrees of effectiveness.[26] School districts continue to struggle to integrate students with limited English proficiency into the schools' regular education program while also providing such students with adequate language instruction.[27] School districts' effectiveness in meeting their civil rights obligations can be impeded by barriers created by the school districts' policies, practices, and other circumstances.[28]

Enforcement Barriers

Some schools have attempted physical integration into regular education programs for students with limited English proficiency without providing an adequate instructional program for these students.[29] For example, in *Diaz v. San Jose Unified School District*, a class action suit was brought on behalf of Mexican American students alleging violations of their constitutional right to equal educational opportunity.[30] The plaintiffs alleged that the school district sanctioned segregation practices that included inequitable distribution of school resources, such as library and laboratory facilities. In 1984 the Federal court found in favor of the plaintiffs and ordered a desegregation program for the school district.[31]

The court-ordered desegregation remedy was problematic because the Mexican American stu-

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22 349 U.S. 294 (1955) (Brown II).

23 42 U.S.C. §§ 2000c to 2000c–9 (1994).

24 *See* Rosemary C. Salomone, *Equal Education Under Law: Legal Rights and Federal Policy in the Post*-Brown Era (New York: St. Martin's Press, 1987), pp. 78–111.

25 Ibid., p. 109.

26 Tyll Van Geel, Taylor Professor of Education, Margaret Warner Graduate School of Education and Human Development, University of Rochester, letter to David Chambers, civil rights analyst, U.S. Commission on Civil Rights, Apr. 11, 1996.

27 *See* Donato and Garcia, "Language Segregation," p. 97; Arias, "Mexican American Segregation," pp. 418–19. *See generally* Crawford, *Bilingual Education*; Russell Gersten and John Woodward, "A Longitudinal Study of Transitional and Immersion Bilingual Education Programs in One District," *The Elementary School Journal*, vol. 95, no. 3 (1995); Maria E. Torres-Guzman, "Language Minorities: Moving from the Periphery to the Center," *The Educational Forum*, vol. 58, (Summer 1994), pp. 410–20; Steven R. Aleman, *Bilingual Education Act: Background and Reauthorization Issues* (CRS Report for Congress) Jan. 25, 1993 (hereafter cited as Aleman, *Bilingual Education Act*).

28 Tyll Van Geel, Taylor Professor of Education, Margaret Warner Graduate School of Education and Human Development, University of Rochester, letter to David Chambers, civil rights analyst, U.S. Commission on Civil Rights, Apr. 11, 1996.

29 Ibid.

30 412 F. Supp. 310 (N.D. Cal. 1976)(Diaz I), *vacated and remanded*, 612 F.2d 411, 416 (9th Cir. 1979)(Diaz II); Diaz v. San Jose Unified Sch. Dist., 518 F. Supp. 622 (N.D. Cal. 1981)(Diaz III), *rev'd and remanded*, 733 F.2d 660 (9th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985).

31 Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660 (9th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985).

dents continued to experience group isolation despite the fact that the school district complied with the desegregation order within 4 years. Although the students were physically integrated with majority white students, the school district failed to provide them with adequate language instruction. As one expert has stated, "Reviewers of desegregation outcomes frequently note that if the desegregation strategy does not include instructional components, it is unrealistic to expect that mere social engineering, the reassignment of students, will have a positive impact on student performance. Rather, they suggest that informal indices of improvement be considered. . . "[32] However, the problems associated with forced desegregation may be solved if an appropriate education program is established that will enable students with limited English proficiency to participate equally with whites in an integrated school.

A lengthy desegregation case in Illinois suggests that segregation problems continue to impede students with limited English proficiency from gaining equal access to their schools' regular education programs. In *People Who Care v. Rockford Board of Education*, the Federal court found that the school district had engaged in discriminatory conduct against Hispanic American students with regard to the District's Bilingual Program.[33] The court found specifically that the school district had engaged in "discriminatory actions" including "the segregation of bilingual students by using the Bilingual Program as a full-time program rather than a part-time pull-out program"[34] and "[i]nvoluntary movement of bilingual students for desegregation purposes while imposing no involuntary transfer burdens on white students;" and "segregation of bilingual students within receiving schools."[35] In these contexts, the court noted that "[t]he goal of these types of language remediation programs is to integrate Spanish-speaking students into English language classrooms. . . . They should not be used to isolate such students."[36] The court ordered injunctive relief for the following segregation-related violations: an unlawful transportation burden on Hispanic students who were moved involuntarily for desegregation purposes while no involuntary desegregation burdens were placed on majority students; conversion of the elementary half-day, pull-out bilingual program which allowed bilingual students to interact with the general school population into a whole-day program *completely segregated* from the rest of the school; and counseling to steer bilingual students "toward easier and less beneficial classes."[37]

School districts such as Rockford have achieved an integrated regular education program, whether on their own initiative or under a desegregation order, in keeping with the mandate of *Brown*.[38] However, they often have failed to provide an education program that offers, at a minimum, the meaningful instruction required by *Lau*.[39] For example, one researcher has noted

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32 Arias, "Mexican American Segregation," p. 419. For students with limited English proficiency, the term "instructional components" refers to the following relevant "informal indices": "access to instructional programs that provide either English as a Second Language (ESL) or bilingual curriculum."

33 851 F. Supp. 905 (N.D. Ill. 1994), *subsequent appeal*, 68 F.3d 172 (7th Cir. 1995), *summ. judgment denied*, 1996 U.S. Dist. LEXIS 9530 (N.D. Ill. Jan. 26, 1996), *remanded*, 90 F.3d 1307 (7th Cir. 1996), *and aff'd in part, rev'd in part, remanded*, 1997 U.S. App. LEXIS 7143 (7th Cir. Apr. 15, 1997). In the 1997 decision, the seventh circuit did not reverse any portions of the prior remedial order relating to bilingual education programs.

34 851 F. Supp. at 929.

35 851 F. Supp. at 1184.

36 851 F. Supp. at 929 (citing Castaneda v. Pickard, 648 F.2d 989, 998 n.4 (5th Cir. 1981)).

37 851 F. Supp. at 1192.

38 *Id.*

39 *See* Sosa, "20 Years After *Lau*," pp. 6–7.

that even schools that have provided a language response program in compliance with *Lau* have failed to offer more than a minimum response. They have not reached the level of equity in access required for meaningful inclusion in regular education programs. This has perpetuated the problem of lower levels of academic success for students with limited English proficiency. For example, on average, Mexican American students in physically desegregated programs without adequate language instruction in the San Jose Unified School District were performing 10 to 12 percentage points lower than white students on standardized tests in all areas.[40] The adverse segregative effects, such as group isolation experienced by students with limited English proficiency in physically integrated education programs, may be as severe as in programs where they are segregated from the school's regular education program. In these school districts, students with limited English proficiency are segregated linguistically.

Conversely, other policies and school programs have focused too heavily on the need for adequate language instruction, thus undercutting the objective of successful integration. These policies and programs have allowed the amount of native language use in programs for students with limited English proficiency to dictate the level of integration between such students and those who are English proficient.[41] For example, schools implementing programs that rely heavily on native language instruction to comply with the requirements of *Lau*, physically segregate students with limited English proficiency from their English-proficient peers because the schools maintain that native language instruction programs will not provide any educational benefits for English-proficient students. As a result, many schools segregate students with limited English proficiency.[42]

Some school districts have taken innovative steps to promote the goal of maintaining students with limited English proficiency in regular education classrooms to the greatest extent possible. In California, until 1987, school districts were required to integrate students in bilingual education programs by ensuring that one-third of students in such programs be English-speaking. Many California school districts place English-proficient students and students with limited English proficiency in a bilingual education program, where instruction is carried out in English and in the native language of the students with limited English proficiency. In 1995, however, after a review of test scores revealed that 600 African American students placed in classes designed for children who speak Spanish and Chinese lagged far behind African American students attending regular classes, the San Francisco city school district concluded that educating English-proficient students in a bilingual program harms the English-proficient students and terminated the program.[43]

According to one author, for desegregation to succeed, the schools must monitor the elimination of physical resegregation, the provision of equitable opportunities to learn, and the achievement of comparable outcomes. Moreover, in designing appropriate responses for students with limited English proficiency, schools must ensure equal access to the core curriculum as well as to courses and programs, such as gifted and talented programs and advanced mathematics and science courses. In addition, schools must ensure that all students have an equal opportunity to learn (high expectations, active participation) and to fulfill their graduation requirements.[44]

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40 Arias, "Mexican American Segregation," pp. 401, 418–20.

41 Donato and Garcia, "Language Segregation," p. 95–97; Sosa, "20 Years After *Lau*," pp. 19–22.

42 Donato and Garcia, "Language Segregation," p. 95. *See also* Sosa, "20 Years After *Lau*," p. 19.

43 Amy Pyle, "Separate, Unequal, and Yet Necessary? More Schools are Segregating Bilingual Students Because of Tight Staffing and Desire for Instruction in Native Language. But Even Backers Fear Isolation and Inequity," *The Los Angeles Times*, June 1, 1995, Metro Section, Part A, pp. 1–2.

44 Sosa, "20 Years After *Lau*," pp. 7–9.

Legislative Barriers

School practices relating to the development and implementation of education programs for students with limited English proficiency have been influenced heavily by the development of Federal education policy since the passage of the original Bilingual Education Act in 1968. However, two aspects of Federal legislation over the past 3 decades have had adverse effects on schools' development and implementation of education programs that seek to maintain a primary goal of placing students in the regular education program to the greatest extent possible. The first of these aspects has been the emphasis on provisions that restrict the options schools may pursue in developing and implementing education programs. The other, perhaps more serious problem, has been the focus on programs for students with limited English proficiency as remedial and compensatory. This latter aspect of Federal legislation has been particularly influential in shaping the way school officials view these programs.

The Bilingual Education Act has placed restrictions on the types of programs that could be funded under the act, and these restrictions have in turn limited school districts' options in developing and implementing education programs for students with limited English proficiency. The original 1968 act did not explicitly require bilingual instruction or the use of the native language but encouraged innovative programs to teach students English. However, between 1974 and 1978, the Bilingual Education Act placed an emphasis on funding bilingual education programs, with the result that school districts were steered away from adopting education programs for students with limited English proficiency that did not use the students' native language in instruction.[45] Although the 1974 amendments to the act sought to ensure grantees under the act would implement programs that prepared students with limited English proficiency to be mainstreamed as quickly as possible, nonetheless, many school districts adopted bilingual education programs that segregated students with limited English proficiency. Some students remained in the bilingual education programs long after they could participate meaningfully in a regular education program, and thus these school districts failed to maintain a primary objective to place students with limited English proficiency in regular education programs to the greatest extent possible.[46]

However, starting in 1978, Congress responded to concerns that bilingual education programs were segregative and to concerns that the Bilingual Education Act gave too much power to the Federal Government to intervene in educational decisions, which traditionally were the prerogative of State and local government. In 1978, Congress amended the Bilingual Education Act in response to findings from an American Institute for Research (AIR) study. The AIR study sampled approximately 286 bilingual education classrooms in 38 Spanish/English programs in operation for at least 4 years.[47] The study found that children were being retained in bilingual classrooms after they had achieved English proficiency and that the bilingual programs studied tended to segregate students with limited English proficiency.[48]

In response to the AIR study, Congress amended the Bilingual Education Act to place greater emphasis on research initiatives and educational approaches to teaching students with limited English proficiency.[49] The revised act emphasized that schools should use a child's native

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45 *See* Rebell and Murdaugh, *National Values*, at 360.

46 *See* Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 Cal. L. Rev. at 1251, 1288 (hereafter cited as Moran, *The Politics of Discretion*) (citing *Bilingual Education: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. and Labor*, 95th Cong., 1st Sess. iii–iv (1977) (testimony of Gary Orfield)).

47 American Institute for Research, *Interim Report, Evaluation of the Impact of ESEA Title VII Spanish/English Bilingual Education Programs* (Palo Alto, CA: American Institute for Research, 1977).

48 Ibid.

language only "to the extent necessary to allow a child to achieve competence in the English Language."[50] Although the act continued to support bilingual education programs that showed an appreciation of students' cultural heritages, it became clear that the primary purpose of programs funded under the act was to allow students to achieve English proficiency.[51] In 1978, Congress also introduced a provision placing a 40 percent limitation on the number of English-proficient students allowed in educational programs designed for students with limited English proficiency. Although this provision has encouraged English-proficient students to attend classes with students with limited English proficiency, English-speaking children could participate in bilingual education classes only if they did not exceed 40 percent of the total classroom population.[52]

In its 1994 reauthorization as Title VII of the Improving America's Schools Act, Congress offered a new definition for bilingual education programs that is broader with respect to the amount of native language use and allows the participation of English-proficient children in bilingual programs without the 40 percent cap.[53]

> Except as otherwise provided for purposes of this title—
>
> (1) Bilingual Education Program.—The term 'bilingual education program' means an educational program for limited English proficient students that—
>
> (A) makes instructional use of both English and a student's native language;
>
> (B) enables limited English proficient students to achieve English proficiency and academic mastery of subject matter content and higher order skills, including critical thinking, so as to meet age-appropriate grade-promotion and graduation standards in concert with the National Education Goals;
>
> (C) may also develop the native language skills of limited English proficient students, or ancestral languages of American Indians, Alaska Natives, Native Hawaiians and native residents of the outlying areas; and
>
> (D) may include the participation of English-proficient students if such program is designed to enable all enrolled students to become proficient in English and a second language.[54]

The Federal Government has endorsed efforts by State and local education agencies to develop other program models, some that are based on the bilingual model and require native language instruction, and others that rely solely on English instruction.

The current act, as did the 1988 act, authorizes recipients to develop either bilingual education programs or special alternative instruction programs.[55] The act defines a "special alternative

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49 The study was completed in 1977 in response to a congressional request for an assessment of federally funded bilingual education projects. Ibid.

50 Bilingual Education Act of 1978, Pub. L. No. 95–561, § 703, 92 Stat. 2268, 2270 (codified as amended at 20 U.S.C. § 3283 (1994)).

51 *See* Moran, *The Politics of Discretion*.

52 Bilingual Education Act of 1978, § 703, 92 Stat. 2270.

53 The current act includes as part of its findings, policy, and purpose the following statement in support of education programs that include both students with limited English proficiency and their English proficient peers: "The use of a child or youth's native language and culture in classroom instruction can. . . (B) benefit English proficient children and youth who also participate in such programs." 20 U.S.C. § 7402(a)(14)(B) (1994).

54 20 U.S.C. § 7601(1)(A)–(D) (1994).

55 *See, e.g.*, 20 U.S.C. §§ 7422(b)(2)(A)(i), 7423(a) (1994); and 20 U.S.C. § 3291(a) (1994). *See also* Gloria Stewner-Manzanaks, "The Bilingual Education Act: Twenty Years Later," *NCBE Focus #6* (Washington, D.C.: National Clearinghouse on Bilingual Education, Fall 1988); Enrique M. Cabillo, "The Bilingual Education Act: 1988 Legislation, National Clearinghouse on Bilingual Education," *NCBE Focus #7* (Washington, D.C., National Clearinghouse on Bilingual Education, Fall 1988).

instructional program" as an educational program that "utilizes specially designed English language curricula and services but does not use the student's native language for instructional purposes."[56] These programs, like the bilingual programs, must enable students with limited English proficiency to achieve English proficiency and academic mastery of subject matter content to meet the standards established by the National Education Goals.[57] Moreover, the act states that these programs are particularly appropriate for schools where bilingual education is impractical and where there is a critical shortage of bilingual teachers.[58] Although funding no longer is restricted exclusively to bilingual education programs, Subpart I of the Bilingual Education Act states that the funding for special alternative instructional programs cannot, unless special circumstances prevail, exceed 25 percent of the funds provided for any type of grant, or of the total funds provided under the Bilingual Education Act for any fiscal year.[59]

In addition to provisions restricting the options schools may pursue in developing and implementing education programs, a second aspect of Federal educational policy illustrates a problem with the general perception of programs for students with limited English proficiency. Since its inception in 1968, Federal support for bilingual education programs has been based on a remedial or compensatory model, in which students' language differences have been viewed as "handicaps" that need to be remedied. The Bilingual Education Act of 1968 was enacted as an amendment to the Elementary and Secondary Education Act of 1965, the educational centerpiece of President Johnson's Great Society program. The 1968 act was seen largely as a remedial effort to help disadvantaged children overcome their language "handicap."[60]

While the remedial nature of programs to provide English language acquisition reflects the primary purpose of such programs, efforts to instill the notion of a child's language differences as a positive addition to the learning environment also are consistent with ensuring equal educational opportunities. Education policymakers, including the Federal courts, have promoted theories of language instruction based on enrichment models within a remedial context. For instance, in crafting desegregation plans in cases involving Mexican American students in the southwest, several courts have relied on a theory of language instruction that seeks to ensure "true integration."[61] This theory, developed by Dr. Jose Cardenas and known as the "incompatibilities theory," requires that all students, regardless of ethnicity, study together in the same instructional program. This program is to be taught in an environment that uses the students' native language as the medium of instruction while at the same time developing proficiency in the second language.[62]

Another example of a promising model is "two-way bilingual immersion," also known as bilin-

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56 20 U.S.C. § 7601(15)(A) (1994).

57 20 U.S.C. § 7601(15)(B) (1994).

58 20 U.S.C. § 7601(15)(C) (1994).

59 *See* 20 U.S.C. § 7426(i)(2) and (3) (1994). The Secretary may award grants for special alternative instructional programs beyond the 25 percent limit in two sets of circumstances: 1) where the diversity of the limited English proficient students' native languages and small number of students speaking each respective language makes bilingual education impractical; and 2) where, despite documented efforts, the applicant has not been able to hire qualified instructional personnel who are able to communicate in the students' native language. 20 U.S.C. § 7426(i)(3) (1994).

60 *See* Crawford, *Bilingual Education*, p. 29. (Crawford notes further that "[f]rom its outset, federal aid to bilingual education was regarded as a 'poverty program,' rather than an innovative approach to language instruction. This decision would shape the development of bilingual programs, and the heated ideological battles surrounding them, over the next two decades." Ibid.). *But see* Moran, *The Politics of Discretion*, at 1263 (arguing that the act was vague as to whether "the programs were designed to promote assimilation by overcoming a language 'deficiency' or were intended to foster pluralism by acknowledging a linguistic asset.").

61 *See, e.g.*, 576 F. Supp. 1503.

gual immersion, two-way immersion, developmental bilingual, and dual language programs. Students learn through two languages in programs that aim to develop dual language proficiency along with academic achievement. These programs provide content area instruction and language development in both languages.[63] Because two-way programs allow teaching content in two areas, they can assist in the development of higher level and academic linguistic skills in two languages for two groups of students, students with limited English proficiency and those who are already English language proficient. Two-way programs are based on a *language enrichment* model that seeks to *value* the language differences among students and use these differences as the basis for a single program that serves both English and non-English speaking students.

Two-way bilingual immersion has been used for many years. In 1963, it was used in the bilingual program begun at the Coral Way Bilingual Elementary School in Miami, Florida. That program, which marked the rebirth of bilingual education in the United States, was not designed as a compensatory program or remedial program. Its goal was fluent bilingualism for both English speaking and limited English proficient students.[64] Although two way programs have existed for a long time, the number of programs in the country has grown considerably over the past 10 years. In 1987, there were only 30 such programs across the country. Today, there are some 182 two-way programs in a variety of languages. Although the vast majority of these programs are taught in Spanish and English, other languages represented include Korean, French, Navajo, Cantonese, Chinese, Arabic, Japanese, Russian, and Portuguese.[65]

Education research on two-way immersion programs indicates that these programs provide an educationally sound, fully integrated learning environment. Authors have reported that:

> Well-designed bilingual immersion leads to more rapid, more successful, and increased integration of Latino students into the mainstream, with no detrimental effects in any area of achievement for students who took part in this program. . . . The major strengths of the bilingual immersion program are (1) its utilization of contemporary thinking on language acquisition and literacy development and (2) its relatively stress-free approach to the rapid acquisition of English in the early primary grades. These assets should be seriously considered by districts as they explore options for instructional strategies for second language students, especially if districts value early entry into the mainstream and early growth of English language competence at both the conversational and conceptual levels . . . Bilingual immersion does seem to provide some benefits to students in terms of rapid English acquisition and increased integration into the mainstream and we have found no discernible drawbacks. In fact, the increased integration resulting from bilingual immersion may lead to a decrease in dropout rates among Hispanic students in junior and senior high school; it may even have other unanticipated effects. Subsequent research is necessary to explore this phenomenon.[66]

Another author has noted:

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62 Rebell and Murdaugh, *National Values*, at 352–54.

63 *See* Christine H. Rossell, "Why Is Bilingual Education Research So Bad? A Critique of the Walsh and Carballo Study of Massachusetts Bilingual Education Programs," Center for Applied Social Sciences, Boston University, October 1986. Rossell describes two-way bilingual education programs in the following way: "[r]ather than being transitioned out of bilingual education, students remain in the program for their entire school career. The goals of this model are social and intellectual rather than remedial and therapeutic. . . Almost all such programs in the United States are bilingual magnet programs which are racially and ethnically integrated in order to desegregate a school system." Ibid., p. 5.

64 *See* Crawford, *Bilingual Education*, p. 28.

65 Donna Christian, *Two-Way Bilingual Education: Students Learning Through Two Languages* (Santa Cruz, CA: National Center for Research on Cultural Diversity and Second Language Learning, 1994), pp. 1–5 (hereafter cited as Christian, *Two-Way Bilingual Education*).

66 Russell Gersten, John Woodward, and Susan Schneider, *Bilingual Immersion: A Longitudinal Evaluation of the El Paso Program* (Washington, D.C.: Read Institute, 1992), p. 31.

> Two-way bilingual programs integrate language minority and language majority students and provide instruction in, and through, two languages. . . . These programs provide content area instruction and language development in both languages. In order to achieve the full benefits of two-way bilingual education, students from the two language backgrounds are in each class, and they are integrated for most or all of their instruction. These programs provide an environment that promotes positive attitudes toward both languages and cultures and is supportive of full bilingual proficiency for both native and nonnative speakers of English.[67]

These programs can provide full integration and effective participation for both students with limited English proficiency and English proficient students. To achieve the full benefits of two-way bilingual education, students from the two language backgrounds are in each class, and they are integrated for most or all of their content instruction.[68] However, such programs often are not practical for school districts because they can only be implemented in certain circumstances, such as where there is only one language other than English represented.[69] In addition, continuing such programs to the secondary level may pose practical difficulties such as insufficient student interest, scheduling difficulties, and a lack of qualified teachers.[70] Perhaps as a result, there are few two-way immersion programs across the country.[71]

Proponents of the educational theory underlying the two-way immersion programs, however, believe that two-way immersion programs can be viewed as a model for school districts in developing and implementing successfully integrated education programs for students with limited English proficiency. Because the objective is fluent bilingualism for both student populations, the students with limited English proficiency are not labeled as "deficient" or as the subjects of a remedial effort. The focus instead is on an enrichment model that aims to develop fluency in two languages.[72]

Two-way immersion is but one example among many alternative language education programs that show potential as a means of providing limited English proficient children with meaningful access to and effective participation in an integrated regular education program. Education researchers are advocating a continued emphasis on newer, more flexible models in the development and implementation of education designed for students with limited English proficiency. Like proponents of two-way immersion, many of today's education researchers and practitioners continue to seek resources for the development and implementation of other new and promising demonstration projects. Properly designed and implemented programs that allow for the two student populations to remain together for the majority of their time in school can work very well. Newer, more flexible models are relying on a two-way bilingual approach. However, such programs are only one choice among many in developing and implementing education programs that provide students with limited English proficiency with effective participation in the regular education classroom.[73]

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67 Christian, *Two-Way Bilingual Education*, p. 1.

68 Ibid., p. 1.

69 Alice Wender, Program Manager, D.C. Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, July 19, 1996.

70 Christian, *Two-Way Bilingual Education*, pp. 12–13.

71 Crawford, *Bilingual Education*, p. 118.

72 *See generally* Dona Christian, *Two-Way Bilingual Education: Students Learning Through Two Languages* (Santa Cruz, CA: National Center for Research on Cultural Diversity and Second Language Learning, 1994); Russell Gersten, John Woodward, and Susan Schneider, *Bilingual Immersion: A Longitudinal Evaluation of the El Paso Program* (Washington, D.C.: READ Institute, 1992).

The 1994 reauthorization of the Bilingual Education Act requires the Secretary of Education to give priority to those programs that promote bilingualism as a goal for all student participants.[74] Although bilingualism for all students is an admirable goal, it also is an ambitious one, calling for well-designed and well-implemented programs. It also requires scarce resources such as funding and qualified staff. If, however, a school district can provide all of these necessary elements, this is an optimum means of achieving an equitable balance between regular education placement or successful integration and the instructional needs of students with limited English proficiency.[75]

Additionally, it should be noted that the original intent behind the Bilingual Education Act was to fund innovative programs with capacity building potential.[76] That special purpose, in combination with the competitive nature of funding under the act and its capacity building purpose, naturally restrict how many programs can be funded. For these reasons, the Secretary of DOEd sets priorities for funding and for selecting the best programs offering the most sound practices according to the Secretary's judgment.

Educational policymakers and school districts must themselves focus closely on efforts to implement effective educational programs that resolve the conflict between the two goals of integration and appropriate special language instruction rather than choosing one over the other. By focusing on inclusion during the development of education policy, schools can implement effective programs that achieve an equitable balance between the two competing interests. More importantly, they will be seeking to achieve equal access to the schools' regular education program for both students with limited English proficiency and their English-proficient peers.

One education expert has made recommendations that can assist in the development of effective educational programs that resolve the conflict between the goals of integrating students with limited English proficiency and of providing them with special language instruction programs:

In addition to the usual programmatic mandates for serving LEP students (identify, place in programs, teach ESL, teach content areas, assess, exit), the following are some additional mandates that my analysis of recent research indicates should be added to new policy regulations for serving LEP students:

- an extraction of factors in the research on effective schools and classrooms and apply to education of LEP students, e.g., campus policy prohibiting racial and ethnic slurs (orderly environment, high expectations).
- a requirement of keeping data on indicators that affect outcomes, such as grade retention (leads to overagedness), disciplinary measures, e.g., suspension (miss out on content coverage), public rewards (high level of students rewarded).
- monitoring and upholding prohibitions against track-

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73 *See generally* Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991; U.S. Department of Education, Office for Civil Rights, "The Provision of and Equal Educational Opportunity to Limited English Proficient Students," Technical Assistance Document (Washington, D.C.: U.S. Department of Education, December 1992); *see also* James Crawford, *Bilingual Education: History, Politics, Theory, and Practice* (Los Angeles, CA: Bilingual Educational Services, Inc., 1991).

74 20 U.S.C. § 7426(b)(1) (1994).

75 Some school districts, such as Miami and Atlanta, have viewed proficiency in a second language as a viable goal given their available resources and have implemented bilingual programs for all of their students. Many other school districts across the country have chosen to focus their resources mainly on English language acquisition for students with limited English proficiency.

76 The original act stated:
"In recognition of the special educational needs of the large numbers of children of limited English-speaking ability in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out new and imaginative elementary and secondary school programs designed to meet these special educational needs." Bilingual Education Act of 1968, Pub. L. No. 90–247, § 702, 81 Stat. 783, 816 (codified a amended at 20 U.S.C. §§ 3221–3262 (1982 & Supp. IV 1986)).

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ing, ability grouping, assignment to special education and exclusion from talented and gifted programs.
• use of native language or ESL techniques to teach LEP students enrolled in advanced courses.
• monitoring innovative teaching techniques to determine if they accomplish the desired aim; participate actively, cover and learn the content, experience high rates of success.
• ensuring successful transition into English; training the receiving teachers. Follow-up for two years. Make provisions for re-enrollment of exited students in special services if needed.[77]

The Commission's review of education research, policy, and practice indicates that the development and implementation of successfully integrated instructional programs requires that: 1) Federal policymakers lift restrictions that place limitations on program implementation; and 2) schools should develop and implement programs based on education theories that emphasize enrichment within the remedial or compensatory aspects associated with limited English proficiency. These findings are supported by a number of policies and practices that emphasize the schools' freedom to choose their own educational approach and the need to value each student's ability to contribute, regardless of his or her language background, rather than regarding students as language deficient. Among these policies and practices are: the less restrictive provisions in congressional policy enunciated in the 1994 Bilingual Education Act and desegregation plans ordered by Federal courts. More importantly, these findings are supported by the various educational models provided by exemplary programs that have succeeded in achieving the goals of successful integration, including the development and implementation of educational programs that address the English language needs of individual students with limited English proficiency, while ensuring effective participation in regular education classrooms.

Maintaining a Primary Objective of Regular Education Placement

OCR staff rely on policy guidance set forth in the September 1991 policy update in conducting compliance reviews and complaint investigations under *Lau*.[78] The guidance provided for evaluating the soundness of a school's educational theory offers no specific guidance as to segregative effects. The September 1991 policy update states,

> *Castaneda* requires districts to use educational theories that are recognized as sound by some experts in the field, or at least theories that are recognized as legitimate educational strategies. 648 F.2d at 1009. Some approaches that fall under this category include transitional bilingual education, bilingual/bicultural education, structured immersion, developmental bilingual education, and English as a Second Language (ESL). A district that is using any of these approaches has complied with the first requirement of *Castaneda*. If a district is using a different approach, it is in compliance with *Castaneda* if it can show that the approach is considered sound by experts in the field or that it is considered a legitimate experimental strategy.[79]

As to the program's implementation, OCR staff conducting compliance reviews and complaint investigations rely on a standard of consistency between the program model and its actual implementation.[80] The approach OCR uses to determine the effectiveness and appropriateness of the program from a compliance perspective addresses the issue of segregative effects in the context of evaluating program implementation.[81] OCR addresses this issue by seeking to determine the *extent* to which separation exists between students who are limited English proficient and their English-proficient peers.[82] For the school

77 Sosa, "20 Years After *Lau*," p. 22.

78 John Binjes, Chief Civil Rights Attorney, Seattle Enforcement Office (formerly Region X), Office for Civil Rights, U.S. Department of Education, telephone interview, June 10, 1996 (hereafter cited as Binjes interview).

79 September 1991 policy update, p. 3.

80 Binjes interview, p. 6.

81 Ibid.

district's program to meet compliance standards, OCR requires that the two student populations be "*separated only to the extent that can be shown to be necessary for them to be successful under the district educational model.*"[83] This standard is based solidly in the civil rights theory of disparate impact. OCR has advanced this standard in the context of the effects test presented in the September 1991 policy update and OCR's discussion of disparate impact theory in its recent policy memorandum on minority students in special education.[84] The OCR Title VI policy on minority students in special education is applicable to similar Title VI issues affecting students with limited English proficiency. The policy states:

> Policies, procedures or practices which do have a disparate impact on the basis of race or national origin must be educationally necessary. The first step of the disparate impact approach is to establish whether there has been a disproportionate denial of opportunity to benefit from a program. The next step is to determine if this is due to a neutral policy, process or practice. If not, then one of the different treatment approaches described above would apply; if yes, then the impact theory would apply, and the next step would be to establish the specific aspect of the process that led to the disproportion. In such cases, this aspect of the process will then be the focus of investigation. In other cases, the evidence will not permit OCR to ascertain the specific aspect of a process because the disproportion may result from a combination of various facets of a process that cannot be separated for analysis. In these cases, the overall process will be the subject of investigation.
>
> OCR will then assess whether the evidence establishes that the recipient's policy, procedure, or practice is educationally necessary, and will determine if a less discriminatory alternative exists. If the evidence does not establish that the policy, procedure, or practice is necessary to meet an important educational goal, then it must be eliminated. Even if the policy, procedure, or practice is determined to be necessary, discrimination may be occurring if there is a less discriminatory alternative that the recipient does not utilize. OCR will need to establish if there is such an alternative before determining whether the recipient violated the law under this part of the disparate impact approach.[85]

Because disparate impact theory is directly applicable to segregation in education programs for students with limited English proficiency, *Lau* policy guidance such as the September 1991 policy update would be more effective if it contained a similarly detailed discussion of the application of disparate impact in OCR's implementation of civil rights policy.

The September 1991 policy update does, however, provide a brief discussion of the segregative effects issue in a compliance context. The policy update presents this standard in a separate discussion on the segregative effects and isolation issues in its policy guidance. The September 1991 policy update states that:

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82 Ibid.

83 Ibid. (emphasis added) (Noting in response to the question "What if from an educational perspective the program is sound, and it is based on sound educational theory, it appears on its face as effective because students are achieving and scoring well on tests, and you looked at the practices and resources and these are equal to those in regular education, but the students are still segregated?" that: "[t]o the extent that the school district can show that the educational practice that they are using is sound and within the mainstream and is considered a reasonable experimental adventure, to the extent that they are able to show that the segregation that results from the implementation of that program would not violate Title VI, but we do look carefully at that issue to make sure that there is a good underlying educational justification for the program. Because there have been cases, historically, where the claim that the school district needed to serve the students was in fact part of an effort on the part of the school district to segregate those students from nonminority students. So that has been a historical problem that we are sensitive to. We don't really find, in our region, that the students are segregated for a substantial period of the school day. So if they are getting separate services designed to address their limited English proficiency, and they are separated only to the extent that can be shown to be necessary for them to be successful under the district educational model they would not be in violation of Title VI by virtue that the students are separate.").

84 Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, "Minority Students and Special Education," July 6, 1995.

85 Ibid., pp. 6–7.

Providing special services to LEP students will usually have the effect of segregating students by national origin during at least part of the school day. *Castaneda* states that this segregation is permissible because 'the benefits which would accrue to [LEP] students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation.' 648 F.2d at 998.

OCR's inquiry in this area should focus on whether the district has carried out its chosen program in the least segregative manner consistent with achieving its stated goals. In other words, OCR will not examine whether ESL, transitional bilingual education, developmental bilingual education, bilingual/bicultural education, structured immersion, or any other theory adopted by the district is the least segregative program for providing alternative language services to LEP students. Instead, OCR will *examine whether the degree of segregation in the program is necessary to achieve the program's educational goals.*[86]

This language clearly indicates that the focus of OCR's inquiry will remain on segregative effects *in the context of the school's chosen program*. Thus, OCR derives its standard for *Lau* compliance by attempting to find a balance between the school's chosen program and the segregative effects it may create. This balance between competing interests reflects the legal framework imposed by the mandates of *Brown* and *Lau*. OCR explicitly states that its focus will be on whether the *degree of separation* is *necessary* to achieve the program's goals. The heart of OCR's inquiry therefore lies in its assessment of the school's ability to implement the program it has chosen properly and not to dictate what kind of program it should have chosen.

The September 1991 policy update offers examples of practices that might result in a finding of noncompliance as a result of a program's segregative effects. These include: "(1) segregating LEP students for both academic and nonacademic subjects, such as recess, physical education, art and music . . . and (2) maintaining students in an alternative language program longer than necessary to achieve the district's goals for the program."[87] The policy update does not provide any further details aside from these examples as to the kinds of educational practices that might result in a finding of noncompliance. However, these examples are useful because they provide some specificity as to the meaning of the term "degree of separation." They are therefore useful as a means of indicating the kinds of practices that might result in a finding of noncompliance based on segregative effects.

Because OCR has not issued formal policy guidance on *Lau* compliance standards since the September 1991 policy update, OCR's policy guidance on the segregative effects of school district issues does not incorporate guidance provided by the Federal courts on this issue after 1991. In addition, OCR's current policy guidance lacks support from recent court cases for its compliance standards related to segregative effects. Several recent decisions by Federal courts have specifically addressed the segregation of students with limited English proficiency.[88] These cases have provided useful language that OCR might incorporate in future policy guidance on the importance of school districts' efforts to ensure that special language programs do not result in segregation for their limited English proficient student participants. For example, a 1994 Federal district court in Illinois addressing segregation of Hispan-

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86 September 1991 policy update, pp. 10–11 (emphasis added).

87 Ibid., p. 11.

88 *See e.g.*, Sinajini v. Board of Educ., LEXIS GENFED Library, DIST File, No. C–74–346 (C.D. Utah Oct. 31, 1975); 851 F. Supp. 905 (finding that the school district operated its bilingual education program in violation of the constitutional rights of the Hispanic students participating in the program in part because the school district required the involuntary movement of bilingual students for desegregation purposes while requiring no involuntary transfer burdens on students in the regular educational program).

ic students issued an opinion noting that the goal of language remediation programs must be "to integrate Spanish-speaking students into English language classrooms. . . . They should not be used to isolate such students."[89] The court presented detailed findings of fact on the segregation related discrimination of the Rockford School District.[90]

In addition, OCR has continued to draft and disseminate technical assistance materials on compliance. OCR has prepared technical assistance materials on such useful topics as program planning and development. Among these documents are materials providing descriptive information on various programs around the country that have achieved success in providing meaningful access to schools' regular education programs for students with limited English proficiency. For example, OCR has included a description of a two-way bilingual immersion program in a technical assistance document entitled "Promising Practices and Programs for Serving National Origin Limited English Proficient Students." This description provides information about the program, including a detailed summary of the program's structure that gives a rough idea of how much interaction occurs between the students who are native English speakers and those whose primary language is other than English.[91]

A review of OCR documents, such as letters of findings and resolution agreements, detailing its enforcement activities reveals that OCR compliance reviews and complaint investigations frequently address issues associated with maintaining a primary objective to place students in regular classes to the greatest extent possible.[92] The main civil rights issue OCR addresses in this context is segregation or racial isolation that is experienced by students with limited English proficiency. OCR recognizes that students who, although physically integrated in the school's regular education program, are nonetheless experiencing isolation because they have been removed from an alternative language program before they have reached a level of English proficiency high enough to allow them to participate effectively in the all-English classroom.

In such a case, the school has failed to implement properly the objective of regular education placement to the greatest extent possible by achieving such placement at the expense of the student's ability to obtain meaningful access to the regular education program. For example, one letter of finding from Region II, in finding a Title VI compliance violation against the school district, cites a New York school district for engaging in the practice of removing students with limited

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89 851 F. Supp. at 929 (citing Castaneda v. Pickard, 648 F.2d 989, 998 n.4 (5th Cir. 1981)). The court went on to note here that the school district "operated the Bilingual Program in violation of the constitutional rights of the bilingual students." 851 F. Supp. at 929.

90 851 F. Supp. at 1001, 1005–06.

91 "Promising Practices and Programs for Serving National Origin Limited English Proficient Students," *Lau* Team, March 1996.

92 Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Otis Falls, Superintendent, North Franklin School District, Connell, WA, re: Case No. 10945010, March 13, 1996; M. Arnold Chavez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Steven H. Peterson, Superintendent, Washington County School District, St. George, UT, re: Case No. 08945022, Nov. 8, 1995; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to George Murdock, Superintendent, Pasco School District No. 1, Pasco, WA, re: Case No. 10935001, Sept. 24, 1993; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Janice Myers, Superintendent, Muscatine Community School District, Muscatine, IA, re: Case No. 07935003, July 14, 1993; M. Arnold Chavez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Richard E. Kendell, Superintendent, Davis County School District, Farmington, UT, re: Case No. 08955011; M. Arnold Chávez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Larry Bussey, Superintendent, Sierra Grande School District R–30, Blanca, CO, re: Case No. 08955013; M. Arnold Chávez, Branch Chief, Compliance Enforcement Division, Region VIII, Office for Civil Rights, U.S. Department of Education, to Richard E. Kendell, Superintendent, Davis County School District, Farmington, UT, re: Case No. 08955011.

English proficiency from an ESL program even though these students had failed to demonstrate that they had developed a sufficient level of English proficiency for an all-English classroom.[93] The findings in this letter of finding strongly suggest that the length of the program was insufficient for some students to attain a level of English proficiency high enough to participate effectively in the school district's regular education program. The school district's emphasis on exiting the ESL students into the regular program before they had attained an adequate level of English proficiency operated to deny them the effective participation they are due under *Lau* and Title VI regulations.

Grouping Students to Reflect Differential Ability in Various Subjects

Background

Grouping students to reflect differential ability in various subjects plays a key role in providing equal educational opportunity. OCR has recognized the importance of this educational practice in a technical assistance document containing a summary of its current policy.[94] In this document, OCR states that "[u]nder Title VI, recipients must also ensure that LEP students have equal and appropriate access to programs such as gifted and talented programs, high level courses, special education programs and extra-curricular activities."[95] To emphasize effectively the importance of grouping students to reflect differential ability in various subjects, schools must develop and implement programs that assess students accurately and offer access to all subject areas, including both remedial, regular, and advanced curricula.

However, many schools' education programs simply ignore this aspect of program development and student placement. The National Council of Teachers of English recently reported that: "Language and racial minority students are only half as likely as Anglo students to be placed in classes for the gifted . . . yet are overrepresented in special education."[96] For the most part, schools have failed to distinguish students' abilities in a variety of academic subjects. As a result, such students are, for example, severely underrepresented in programs for the gifted and talented.[97] Education programs routinely offer methods for identifying such differentials for Eng-

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93 Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Alan G. Hernandez, Superintendent, Uniondale Public Schools, Union Free School District, Uniondale, NY, re: Case No. 02–92–5005, Dec. 27, 1993.

94 U.S. Department of Education, Office for Civil Rights, "Section 625: Treatment of Limited-English Proficient Students," May 1, 1996.

95 Ibid., p. 3.

96 Gonzalez, *Language, Race, and the Politics of Educational Failure*, p. 3 (citing Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (New York: Harper Perennial, 1992)).

97 One example of this phenomenon is Arizona's public school system. According to a 1987 research report, students with limited English proficiency represented 16.17 percent (or 96,674 persons) of the school-age population in Arizona. A conservative estimate of the percentage of the general population that is considered gifted and talented would be 3 percent. Using the 3 percent criterion, one would estimate that 2,900 students with limited English proficiency in Arizona would be receiving some type of services for the gifted. In fact, only 143 such children, or 0.14 percent of such students in Arizona were in gifted programs at the time of the study. "Meeting the Needs of Gifted and Talented Minority Language Students," *ERIC Digest* #E480, adapted from Linda M. Cohen, "Meeting the Needs of Gifted and Talented Minority Language Students," *New Focus*, vol. 8 (Fall 1988) (hereafter cited as "Meeting the Needs of Gifted and Talented Minority Language Students") (citing C.J. Maker, *Project DISCOVER: Discovering Intellectual Skills and Capabilities While Providing Opportunities for Varied Ethnic Responses* (Tucson, AZ: University of Arizona, Division of Special Education and Rehabilitation, 1987). Other studies indicate that the proportions of blacks, Hispanics, and Native Americans identified as gifted represents only one-half those expected. Ibid. (citing K.S. Chan and M.K. Kitano, "Demographic Characteristics of Exceptional Asian Students," in M.K. Kitano and P.C. Chinn, eds., *Exceptional Asian Children and Youth* (Reston VA: The Council for Exceptional Children, 1986), pp. 1–11).

lish-proficient students so they must also do it for students with limited English proficiency.[98]

There is little law or policy that directly addresses the need for grouping students to reflect differential ability in various subjects. However, Congress, in providing guidelines to school districts receiving funds under the Bilingual Education Act, has required the development of evaluation procedures incorporating indicators of students' progress in a variety of curricular and content areas. Part A of the act states that:

> (a) Each recipient of funds under this subpart shall provide the Secretary with an evaluation, in the form prescribed by the Secretary, of such recipient's program every two years. . .
>
> (c) Evaluation Components.—Evaluations shall include —
>
> (1) *how students are achieving the State student performance standards*, if any, including data comparing children and youth of limited-English proficiency with nonlimited English proficient children and youth with regard to school retention, academic achievement, and *gains in English (and, where applicable, native language) proficiency*;
>
> (2) program implementation indicators that provide information for informing and improving program management and effectiveness, including data on appropriateness of curriculum in relationship to grade and course requirements, appropriateness of program management, appropriateness of the program's staff professional development, and appropriateness of the language of instruction;. . .(emphasis added).[99]

These requirements for schools receiving funds under the Bilingual Education Act demonstrate the valid concern among educators and policymakers that schools focus on addressing students' differential abilities and achievement levels generally and in specific subject areas.

Grouping Students to Reflect Differential Abilities in Language and Content Areas in the Development and Implementation of Education Programs

According to a recent report of the National Academy of Sciences on educational issues relating to students with limited English proficiency, "learning, knowledge, and understanding differ across subject matters."[100] In the context of educating students with limited English proficiency, grouping students to reflect differential ability in various subjects has not played an important role in schools' determinations about student ability in different curricular areas. The problems associated with education programs that fail to group students with limited English proficiency to reflect differential ability include failure to detect differential abilities across content areas and to detect gifted and talented abilities and the need for special or remedial education programs for such students.[101] Grouping practices that reflect

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98 Among the recommendations in its recent report on the assessment of students whose primary language is other than English and who have limited English proficiency, the Council of Chief State School Officers has included "Assessment for placement into the appropriate learning experiences and language assistance programs. Council of Chief State School Officers, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency* (Council of Chief State School Officers, State Education Assessment Center, Resource Center on Educational Equity, 1992), p. 7 (hereafter cited as Council of Chief State School Officers, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency*).

99 20 U.S.C. § 7433(a),(c)(1)–(3) (1994).

100 Diane August and Kenji Hakuta, eds., *Improving Schooling for Language Minority Children: A Research Agenda* (Washington, D.C.: National Academy Press, 1987), p. 65.

101 *See generally* Andrea B. Bermudez et al., "Meeting the Needs of the Gifted and Talented Limited English Proficient Student: The UHCL Prototype," in Lillian M. Malave, ed., *Annual Conference Journal. Proceedings of the National Association for Bilingual Education Conferences* (Tucson, AZ, 1990; Washington, DC, 1991), pp. 115–133 (arguing that the needs of gifted and talented limited English proficient (G/T LEP) students are being poorly met. A University of Houston-Clear Lake (UHCL), Texas, teacher education curriculum designed to train teachers in the identification, placement, and instruction of gifted and talented limited English proficient students (GT/LEPs) is discussed.); Andrea B. Bermudez and Steven J. Rakow, "Examining Identification and Instruction Practices for Gifted and Talented Limited English Proficient Students, 1993," in

students' differential abilities may eliminate problems for students with limited English proficiency, such as a school's failure to provide appropriate instruction across content areas, the underinclusion of students with limited English proficiency in advanced programs and gifted and talented programs, and a school's failure to develop appropriate curricula for such students in advanced programs and gifted and talented programs.

Very often such students are not tested adequately to gauge accurately their math and science ability. The evaluation procedures utilized by schools have been too focused on English language development. Therefore, they have not been effective in distinguishing among performance in different content areas.[102] This is so because of the differentials in a students' abilities across different curricular areas. In the case of students with limited English proficiency it is especially important for evaluation procedures to include mechanisms that do not confuse language proficiency with substantive ability and achievement.

The educational literature reports that schools are failing to provide adequate mathematics instruction for students with limited English proficiency.[103] For example, many schools do not place students with limited proficiency according to their cognitive abilities in content areas such as mathematics. Instead, once the school district has determined the presence of limited English proficiency in any given student, all such students are placed together in education programs without regard for their differing abilities in various curricular areas. They are all grouped together on the basis of language deficiencies.[104]

The practice of developing programs and placing students with limited English proficiency has negative implications with respect to detecting advanced abilities or giftedness in such students. The principal evidence here is the severe underrepresentation of such students in gifted and talented programs. Statistics on general enrollment and enrollment on gifted programs indicate

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Lillian M. Malave, ed., *Annual Conference Journal. Proceedings of the National Association for Bilingual Education Conferences* (Tucson, AZ, 1990; Washington, DC, 1991), pp. 99–114 (underrepresentation of minority students in gifted and talented (G/T) programs is a well established fact. A study examined procedures and criteria used to identify, place, and instruct gifted and talented students with limited English proficiency (GT/LEPs) in Texas, California, Colorado, Florida, Arizona, and New York public schools, to help identify factors contributing to underrepresentation of this population in gifted and talented (GT) educational programs.); Ruth S. Cowan, *Development and Implementation of Procedures for Identifying Black and Limited English Proficient Gifted Students*, Major Applied Research Project Report, Nova University (1992) (describing an identification prototype used by a large metropolitan school district (Gwinnet County, GA) to identify giftedness in black and limited English speaking students. Underrepresentation of these groups in gifted programs is seen to result from: teacher reluctance to refer students from the target populations; the inappropriateness of conventional assessment measures for evaluating the intellectual ability of these students; and the problem of a narrow definition of giftedness mandated by State regulations.)

102 *See generally*, Mark W. LaCelle Peterson and Charlene Rivera, "Is It Real for All Kids? A Framework for Equitable Assessment Policies for English Language Learners," *Harvard Educational Review*, vol. 64, no. 1 (Spring 1994), pp. 55–75 (hereafter cited as Peterson and Rivera, "Is It Real for All Kids?"); Patricia Gandara and Barbara Merino, "Measuring the Outcomes of LEP Programs: Test Scores, Exit Rates, and Other Mythological Data," *Educational Evaluation and Policy Analysis*, vol. 15, no. 3, pp. 320–38 (hereafter cited as Gandara and Merino, "Measuring the Outcomes of LEP Programs").

103 Sheryl L. Santos, "Mathematics Instruction in Bilingual Education," in Raymond V. Padilla and Alfredo H. Benavides, eds., *Critical Perspectives on Bilingual Education Research*, (Tempe, AZ: Bilingual Press, 1992), p. 242 (citing R. Fernandez, "Bilingualism and Hispanic School Achievement," *Social Science Research*, vol. 15 (1986), pp. 43–70); C. Bradley, "Issues in Mathematics Education for Native Americans and Directions for Research," *Journal for Research in Mathematics Education*, vol. 15, no. 2 (1984), pp. 96–106; S. Tsang, "The Mathematics Education of Asian Americans," *Journal for Research in Mathematics Education*, vol. 15, no. 2 (1984), pp. 114–22; L.A. Valverde, "Underachievement and Underrepresentation of Hispanics in Mathematics and Mathematics-Related Careers," *Journal for Research in Mathematics Education*, vol. 15, no. 2 (1984), pp. 123–33)).

104 Council of Chief State School Officers, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency*; "Meeting the Needs of Gifted and Talented Minority Language Students," p. 2.

that in 1988 white students represented 71.2 percent of the general enrollment, compared to 81.4 percent of the gifted enrollment; African American students represented 16.2 percent of the general enrollment and 8.4 percent of the gifted enrollment; Hispanic students represented 9.1 percent of the general enrollment and 4.7 percent of the gifted enrollment; and Asian American students represented 2.5 percent of the general enrollment and 5.0 percent of the gifted enrollment.[105] Education research has advanced several reasons for failure to detect giftedness in students with limited English proficiency. One reason is schools' reliance on standardized IQ tests and tests of oral or written language skills administered in English.[106] This reliance on standardized tests leads to results in the failure of assessment instruments to recognize the importance and account for different learning styles and cultural and linguistic differences.[107]

The absence of appropriate assessment instruments accounts in large part for the under-identification of giftedness in students with limited English proficiency.[108] Schools need to: (1) reevaluate the assessment instruments used with a particular emphasis on determining whether there is a negative impact of English language standardized tests and (2) use multiple assessment measures that can allow students with limited English proficiency to demonstrate skills and performance potential that schools are not detecting using current measures. Education research in this area focuses on such issues as the definition of giftedness, the assessment of gifted students and the development and implementation

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105 "Meeting the Needs of Gifted and Talented Minority Language Students," p. 1 (citing I. Zappia, "Identification of Gifted Hispanic Students: A Multidimensional View," in C.J. Maker and S.W. Shiever, eds., *Defensible Programs for Gifted Students from Underserved Populations: Cultural and Ethnic Minorities* (Austin, TX: Pro-Ed, 1989), pp. 10–26; and M. Machado, "Gifted Hispanics Underidentified in Classrooms," *Hispanic Link Weekly Report*, (February 1987), p. 1.

106 Ibid., p. 1. Cohen notes: "Most procedures for identifying gifted and talented students have been developed for use with middle-class children who are native English speakers. Such procedures have led to an underrepresentation of minority language students in gifted and talented programs. . . Reliance on IQ tests *alone* [emphasis added] has greatly diminished the potential number of gifted students." Ibid.

107 "Educators who work closely with minority language students argue that using standardized IQ tests as a primary measure of giftedness does not fairly accommodate the linguistic and cultural differences of these students. These educators look to identify the 'able learner' rather than the more narrowly defined gifted student who scores in the top 3 percent on IQ tests. Able learners are defined by some educators as students in the top 10 percent of their class who have shown some extraordinary achievement in one or more areas such as science, mathematics, or the performing arts." Ibid., p. 1.
Moreover, "[d]ifferent learning styles may also contribute to the underrepresentation of gifted and talented minority language students. Native Americans are often caught between the schools' value of independence and the home and community value of interdependence. In school, students generally sit in rows and face the teacher, whereas in Native American culture, everyone would be seated in a circle and decisions would be made collectively. "Among many Hispanics, cultural differences may also produce manifestations of giftedness that differ from the traditional manifestations in the majority culture. In Puerto Rico, for example, children learn to seek the advice of their family rather than act independently . . . Respect for elders is often valued more than preconsciousness, which can be disrespectful. Similarly, the Mexican-American child who respects elders, the law, and authority becomes vulnerable in a school system that values competition, initiative, and self-direction." Ibid., pp. 1–2 (citing Perrone and Aleman, 1987).

108 "Giftedness is not a trait inherent to native English speakers; however, there is a lack of instruments that can detect giftedness in minority language students (Gallagher, 1979; Llanes, 1980; Raupp, 1988; Renzuli, Reis and Smith, 1981). Most tests rely on either oral or written language skills. Minority language students who are not considered gifted may, in fact, be very gifted, but unable to express themselves in English. Therefore, many researchers urge that great caution be exercised in using English standardized tests for the identification of linguistic and cultural minority students. These researchers also recommend selecting tests that reduce cultural and linguistic bias. Ibid., p. 2 (citing J.J. Gallagher, "Issues in Education for the Gifted," in A.H. Passow, Ed. *The Gifted and the Talented: Their Education and Development*, (Quincy, MA: Massachusetts Department of Education, Office for the Gifted and Talented, 1979); J.R. Llanes, "Bilingualism and the Gifted Intellect," *Roeper Review*, 2(3), 11–12 (February-March, 1980); M. Raupp, *Talent Search: The Gifted Hispanic Student* (Quincy, MA: Massachusetts Department of Education, Office for Gifted and Talented, 1988); J.S. Renzulli, S. Reis, and L.H. Smith, *The Revolving Door Identification Model* (Mansfield Center, CT: Creative Learning Press, 1981)).

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of programs for gifted and talented students with limited English proficiency.[109]

Educational experts suggest that new, more valid procedures are necessary for appropriate placement of students with limited English proficiency.[110] Placement procedures need to assess accurately not only students' language proficiency but also their curricular knowledge to provide each student with appropriate instruction.[111] Providing all limited English proficient students with the same or similar instruction will not meet students' individual educational needs. Instruction for students with limited English proficiency "should build on their existing linguistic and cognitive skills."[112] Moreover, "instruction should address specific developmental needs and be based on students' strengths-in language. . . or content."[113]

Educational experts also agree that "students are often inappropriately placed or they are identified as intellectually inferior because their performance on English language achievement tests or other content tests is reduced by their limited understanding of the language."[114] Such students may be gifted, but their giftedness cannot be detected because they are unable to express themselves in English.[115] Therefore, great caution should be exercised in using English standardized tests for the identification of giftedness in students with limited English proficiency, particularly because these students are members of linguistic or cultural minorities. Tests also should be selected with regard for reducing cultural and linguistic bias.[116]

An alternative to using English language standardized tests is the assessment of students with limited English proficiency in their native language.[117] Tests administered in a student's native language allow for a greater likelihood for accurate measurement in a number of skills areas. In addition, many school districts now include behavioral checklists or inventories, nominations, or related techniques to identify gifted and talented students with limited English proficiency. Other methods such as interviews, self-reports, autobiographies, and case histories also are being used commonly to identify gifted and talented students among this population.[118] Educational researchers recommend methods such as case studies in the identification of giftedness among students with limited English proficiency because such methods rely on multiple sources of information about a student's performance.[119]

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109 "Meeting the Needs of Gifted and Talented Minority Language Students," p. 4.

110 Council of Chief State School Officers, *Recommendations for Improving the Assessment and Monitoring of Students with Limited English Proficiency*, p. 11. *See generally*, Peterson and Rivera, "Is It Real for All Kids?"; Gandara and Merino, "Measuring the Outcomes of LEP Programs"; "Meeting the Needs of Gifted and Talented Minority Language Students" (concluding that: "Providing appropriate gifted and talented programs for students from linguistically and culturally diverse backgrounds is a challenge that many school districts face. Since minority language students represent an increasing percentage of the total school population, meeting the educational needs of gifted minority language students is vital. All students, including minority language students, deserve the most challenging instruction possible." Ibid., p. 4).

111 Ibid.

112 Ibid.

113 Ibid.

114 Ibid.

115 "Meeting the Needs of Gifted and Talented Minority Language Students," p. 2.

116 Ibid.

117 Ibid.

118 Ibid.

119 Ibid. (citing J.S. Renzulli and L.H. Smith, "Two Approaches to Identification of Gifted Students," *Exceptional Children*, vol. 43 (1977), pp. 512–18).

Gifted and talented programs must be structured to accommodate *all* students across racial, ethnic, cultural, and linguistic classifications.[120] For example, once students have been identified and placed in a gifted and talented program, it is important that the program is designed and structured to meet the educational needs of each individual student in the gifted and talented program. In the case of students with limited English proficiency who have been identified as gifted and talented, it is therefore equally important that schools work to develop appropriate programs in meeting their individual educational needs.[121] When developing a gifted and talented curriculum, educators must address the educational needs of gifted and talented students with limited English proficiency.[122]

Another means through which schools can maintain a primary objective of placing students in regular education classes while still providing appropriate special instructional services is through the prereferral process. This term refers to informal procedures that are undertaken by teachers, other school personnel, and parents when a child is found to be having difficulties in school to determine whether the child's educational needs can be addressed in the regular classroom before a decision is made to refer the child for assessment for eligibility for special education. The prereferral process may include 1) direct ob-

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120 *See* Judith A. Márquez and Cheryl B. Sawyer, "Curriculum Extension for the Gifted and Talented Student with Limited English Proficiency," *National Association for Bilingual Education Annual Conference Journal 1992–1993*, pp. 21–30 (Washington, D.C.: National Association for Bilingual Education, 1993) (Noting that: "Success in school is related to the understanding and utilization of abstract concepts. Gifted children often excel in their ability to acquire concepts faster and to develop these concepts to higher levels of abstraction than average children. Children are able to solve many kinds of problems intuitively even though they may not be able to verbalize the process. For GT/LEP children trying to verbalize a process in English may be even more of a challenge because of their lack of proficiency in that language. Therefore, teachers should incorporate teaching techniques in which children can work on some problems without necessarily providing verbal explanations (Frazier, 1978) . . . The differentiated curriculum should allow all GT students, regardless of their English proficiency, the opportunity to pursue topics in depth at a pace commensurate to the students' ability and interest. LEP students should be given the option to pursue their areas of interest in their native language or English. Resources should be made available in a variety of formats and languages in order to give LEP students the same opportunities to pursue interests which fully English proficient GT students have. The information and concepts which LEP students acquire in their first language can then be transferred to English. Ibid., p. 25 (citing M.M. Frazier, "Culturally Different Gifted/Talented: Educational Implications—Cognitive," in H.N. Rivlin, ed., *Advantage: Disadvantaged Gifted. Presentations from the Third National Conference on Disadvantaged Gifted* (Ventura, CA: Ventura County Superintendent of Schools Office, 1978), pp. 53–57).

121 *See* Marquez and Sawyer, "Curriculum Extension for the Gifted and Talented Students with Limited English Proficiency," (asserting that: "Gifted and talented (GT) children "require differentiated educational programs and/or services beyond those normally provided by the regular school program" if they are "to realize their contribution to self and society. . ." (Marland, 1971, p. ix). The differentiated curriculum forms the core of the gifted and talented program. Educators may, however, fail to recognize the need for a differentiated curriculum designed to meet the needs of all students identified as gifted and talented. Just as a need exists for individualization within the regular education program, so does a need for individualization within the gifted and talented program. As more culturally and linguistically diverse students are identified as gifted and talented, the need for an appropriate educational program which considers their linguistic and cultural needs becomes a priority."). Ibid., p. 21 (citing S.P. Marland, *Education of the Gifted and Talented* (Washington, D.C.: U.S. Government Printing Office, 1971); and C.B. Sawyer and J.A. Marquez, *Curriculum Extension for the Gifted and Talented Student with Limited English Proficiency* (Houston, TX: Research Center for Language and Culture, University of Houston-Clear Lake, 1992)).

122 Ibid. (stating that: "When developing the appropriate differentiated curriculum for GT/LEP (Limited English Proficiency) students, educators must keep in mind that culturally and linguistically diverse gifted students share characteristics with all other gifted students although there may be some differences exhibited in behaviors which emerge from the students' cultural values, needs, and interests (Kaplan, 1982). Therefore, the curriculum which is developed for gifted and talented students needs to be extended to address the linguistic and cultural needs of that population. The curriculum must be designed for both the general and specific characteristics of the gifted and talented population for whom it was intended (Kaplan, 1982). Ibid. (citing S. Kaplan, "There is a Single Curriculum for the Gifted," *Gifted Child Quarterly* vol. 26, no. 1 (1982), pp. 32–33.).

servation of the students in the regular classroom; 2) analyzing how the student behaves and interacts verbally in different settings; and 3) reviewing the methods of instruction that are used in the regular classroom.[123] The prereferral process most often occurs in the context of addressing the educational needs of students suspected of having disabilities. However, there is strong support in the research literature for adapting this process to the educational needs of students with limited English proficiency.[124]

Grouping to Reflect Differential Abilities

OCR's September 1991 policy update addresses these issues in its discussions of access to and placement in gifted and talented, special education, and "other specialized programs." Appropriately, the policy update discusses both access to gifted and talented programs and special education programs as part of its analysis under the second prong of the *Castaneda* test, proper program implementation. In offering policy guidance on access to gifted and talented programs, the policy update states:

> The exclusion of LEP students from specialized programs such as gifted/talented programs may have the effect of excluding students from a recipient's programs on the basis of national origin, in violation of 34 C.F.R. § 100.3(b)(2), unless the exclusion is educationally justified by the needs of the particular student or by the nature of the specialized program.
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> LEP students cannot be categorically excluded from gifted/talented or other specialized programs. If a recipient has a process for locating and identifying gifted/talented students, it must also locate and identify gifted/talented LEP students who could benefit from the program.[125]

A senior OCR staff member described OCR's approach to determining whether school districts are complying with Title VI/*Lau* with respect to ensuring that students are grouped according to their differential abilities in different subjects:

> [w]e usually look at . . . whether students are being placed in gifted and talented programs. Again we've found a lot of districts that just had a blanket "if you're LEP, you're not gifted and talented" which is interesting. They just wouldn't consider them. It was simply "learn English first and then we'll figure out whether you should be in gifted and talented programs or you should be in an academically advanced program." It was very simply that there was no opportunity for LEP kids to participate in these programs. We worked with the districts to look first at the student's ability and how that can be served. And there are lots of courses particularly for high school students in the math and some of the science courses where limited ability in English could be worked with.[126]

OCR has found violations against school districts that do not provide access to talented and gifted programs for students with limited English proficiency. For example, a letter of findings to a school district in New York cites a Title VI violation because the school district engaged in a practice of differential treatment. OCR determined first that "[i]nformation provided by the District, and confirmed during interviews with District administrators and staff reveal that during and subsequent to the school year under review, no LEP students were enrolled in any of the District's gifted and talented programs."[127] The

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123 This process involves several steps. Ibid., p. 13.

124 *See* G. Wallace, S.C. Larsen, and L.K. Elksnin, *Educational Assessment of Learning Problems: Testing for Teaching* (Boston, MA: Allyn and Bacon, 1992); Beth Harry, *Cultural Diversity, Families, and the Special Education System: Communication and Empowerment* (New York, NY: Teachers College Press, 1992); C.S. Lidz, ed., *Dynamic Assessment: An Interactional Approach to Evaluating Learning Potential* (New York, NY: Guilford, 1987); A. Ortiz, *Characteristics of Limited English Proficient Hispanic Students Served in Programs for the Learning Disabled: Implications for Policy and Practice (Part II)*, Bilingual Education Newsletter, vol. IV (Austin, TX: University of Texas at Austin, 1986).

125 September 1991 policy update, p. 8.

126 Cathy H. Lewis, Acting Senior Enforcement Officer for the Western Part of the United States, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., June 14, 1995, p. 6 (hereafter cited as Lewis interview).

analysis supports this finding with facts indicating that the "LEP students are not allowed to enroll in elective courses unless they have sufficient credits to graduate. However, non-LEP students are permitted to enroll in elective courses regardless of whether they have sufficient credits to graduate."[128]

OCR concluded that the district violated Title VI because the district did not "provide equal opportunity for national origin minority students who are LEP to enroll in elective courses as are afforded other students. Additionally, the District by use of English proficiency as an eligibility criteria has excluded LEP students from its gifted and talented programs."[129] The findings presented in this letter of finding rest on sound civil rights principles for finding a compliance violation. They clearly reveal that the school district engaged in impermissible disparate treatment against students with limited English proficiency by not permitting them to enroll in elective courses while similarly situated English proficient students were allowed to enroll and by requiring a high level of English proficiency for participation in gifted and talented programs. OCR's finding of a violation was appropriate because the English proficiency requirement reflected unequal treatment *based* on an impermissible criterion. As OCR concludes in this letter of finding, this was a violation of the Title VI regulation at 34 C.F.R. § 100.3 (b), which states that a recipient of Federal funding may not "[d]eny an individual any service, financial aid, or other benefit provided under the program; or [p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program."[130]

The September 1991 policy update also offers specific guidance to school districts in assessing and placing students with limited English proficiency in special education classes:

> OCR's overall policy on this issue, as initially announced in the May 1970 memorandum, is that school systems may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English language skills. The additional legal requirements imposed by Section 504 also must be considered when conducting investigations on this issue. This policy update does not purport to address the numerous Title VI and Section 504 issues related to the placement of limited English-proficient students in special education programs. Although OCR staff are very familiar with Section 504 requirements, additional guidance on the relationship between Section 504 and *Lau* issues that arise under Title VI may be helpful. A separate policy update will be prepared on those issues.
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> Pending completion of that policy update, *Lau* compliance reviews should continue to include an inquiry into the placement of limited English proficient students into special education programs where there are indications that LEP students may be inappropriately placed in such programs, or where special education programs provided for LEP students do not address their inability to speak or understand English. In addition, compliance reviews should find out whether recipients have policies of "no double services": that is, refusing to provide both alternative language services and special education to students who need them. Such inquiries would entail obtaining basic data and information during the course of a *Lau* compliance review regarding placement of LEP students into special education programs. If data obtained during the inquiry indicate a potential problem regarding placement of LEP students into special education, the regional office may want to consult headquarters about expanding the time frames for the review to ensure that it can devote the time and staff resources to conduct a thorough investigation of these issues. Alternatively, the region could schedule a compliance review of the special edu-

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127 Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Alan G. Hernandez, Superintendent, Uniondale Public Schools, Union Free School District, Uniondale, NY, Dec. 27, 1993, re: Case No. 02–92–5005, p. 4.

128 Ibid., pp. 3–4.

129 Ibid., p. 4.

130 34 C.F.R. § 100.3(b)(1)–(1)(i) (1996).

cation program at a later date. In small to medium-sized school districts, regional offices may be able to gather sufficient data to make a finding regarding the special education program as part of the overall *Lau* review.[131]

The policy update on Section 504 and *Lau* compliance alluded to in the September 1991 policy update never was issued. When OCR does issue this guidance, it will be an invaluable source of information for OCR staff conducting complaint and compliance reviews.

The misclassification of students with limited English proficiency into special education programs is a serious compliance problem. OCR has found severe problems with misclassification into special education programs.[132] The September 1991 policy update provides sound basic guidance on this issue in stating that "school systems may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English language skills."[133] However, the policy update does not provide any detailed guidance on this issue.

In general, the policy update lacks any specific policy guidance on assessment procedures for determining appropriate placement in special education or both special education and an alternative language program for students with limited English proficiency. The policy update does not specify which *kinds* of instruments would be sufficient in making an assessment as to the level of a given student's aptitude or abilities for the purpose of determining the appropriateness of a special education placement for that student. For example, the lack of detail here begs the question of whether an appropriate instrument would have to be administered in the student's native language. In addition, although the policy update does refer to the problem of "no double services," where a school district does not provide both alternative language services and special education even though there may be students who require both, the policy update does not specifically address assessment procedures for determining whether a student with limited English proficiency would be appropriately placed in an alternative language program or a special education program or both.

The section 504 regulations do not address this issue either. OCR has issued a regulation stating that recipient school districts must ensure that "[t]ests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure."[134] This regulation refers to a speech impairment. This terminology is inadequate as a means of establishing coverage for students with limited English proficiency because such proficiency may not be deemed an "impairment." The appendix for this section notes that this subparagraph formerly contained a regulation requiring recipients to "provide and administer evaluation materials in the native language of the student," but that this requirement had been removed from the regulations "as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute."[135] However, none of OCR's current policy guidance on *Lau* compliance makes any reference to this requirement.

In addressing the issues of underrepresentation in programs for the gifted and talented and overrepresentation in special education, OCR's compliance standards in addressing these issues remain consistent with a disparate impact analysis. OCR focuses closely on the specific assessment procedures undertaken by the school dis-

131 September 1991 policy update, pp. 7–8.

132 Martinez interview, pp. 4–5.

133 September 1991 memorandum, p. 7.

134 34 C.F.R. § 104.35(b)(3) (1996).

135 34 C.F.R. § 104, app. A, no. 25 (1996).

trict. The crucial inquiry for determining compliance is whether the assessment process is neutral and nondiscriminatory and can be educationally justified. In a recent interview, one of OCR's senior enforcement officials has observed that "[i]n access for gifted and talented again, programs have lots of different measures for how they assess whether a student should be in gifted and talented programs, and there are ways for even non-English speaking students to be evaluated for those programs. We would want to know 'has that been done or did you just make conclusions about how this student's parents are migrants and he couldn't possibly be in AP calculus.' So looking behind some conclusions to look at the assessment process they went through to come to the kinds of conclusion they came to."[136]

OCR provides technical assistance to its regional staff on addressing the complex issues associated with special education for students with limited English proficiency. For example, OCR conducts teleconferences with its regional staff working on *Lau* compliance reviews in the Dallas Enforcement Office (formerly Region VI) and the Denver Enforcement Office (formerly Region VIII). OCR attorneys who work on *Lau* issues act as "facilitators/trainers" for the teleconferences. These attorneys presented regional staff attending the teleconference with a summary of the legal authority including applicable special education regulations and policy excerpts on special education for students with limited English proficiency.[137]

Reevaluating and Regrouping Periodically to Reflect Both the Differential Ability in Various Subjects and Changes in Achievement, Performance, and Development

Background

Reevaluating and regrouping periodically to reflect the differential ability in various subjects and changes in achievement, performance, and development is a practice that encompasses assessments, evaluation, and exit criteria for students once they have been identified and placed in an education program. It is extremely important for students with limited English proficiency because it addresses the issue of adequate exit criteria. Such criteria are of crucial importance since they will be used to determine whether the student is ready to enter an all-English classroom environment. The students' entrance into an all English classroom marks his or her inclusion in the school's regular education program and offers that student the greatest access to the school's educational opportunities.

The importance of reevaluating and regrouping periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development is evident in statutory, regulatory, and case law. For example, Congress has recognized the importance of reevaluating and regrouping periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development in its policies in the Bilingual Education Act. The Bilingual Education Act includes provisions on the evaluation and assessment of student

136 *See* Lewis interview, p. 7.

137 *See* U.S. Department of Education, Office for Civil Rights, "Special Education and Language Minority Students," Teleconference, Mar. 13, 1996.

progress within an instructional program for students with limited English proficiency.[138] In addition, Federal courts have considered assessment measurements used by school districts as exit criteria for students with limited English proficiency in determining whether school districts are applying appropriate remedial measures for such students' language barriers under the Equal Educational Opportunities Act.

Reevaluating and regrouping is as important as the original identification and placement. It must be implemented with the same consideration for neutral and nondiscriminatory means. As students in special programs become ready to enter the school's regular education programs they need an effective means of evaluating the changes in their performance. This discussion focuses on procedures for assessing student performance in instructional programs designed to develop English proficiency.

The discussion on reevaluating and regrouping periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development will present various education research and policy perspectives on evaluation of student participants in special language programs. It will focus on the barriers created by specific measurements used in assessing student progress and ultimately the criteria used to exit students into the school's regular education program. In addition, it will focus on the mechanisms through which schools evaluate the programs themselves in the context of providing appropriate assessment measurements and exit criteria.

Providing Adequate Within-Program Assessment, Monitoring, and Exit Criteria in the Development and Implementation of Education Programs

If not properly implemented, certain school practices in evaluating and responding to the performance of students with limited English proficiency can have adverse affects. For example, the practice of retaining such students in a grade beyond the normal length of time, known as grade retention, greatly enhances the probability that the student will eventually drop out.[139] Moreover, within-program evaluations of students that rely heavily on standardized testing procedures suggest that these procedures remain problematic as indicators of student ability.[140]

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138 20 U.S.C. § 7433(a),(c)(1)–(3) (1994) (emphasis added).

139 The National Council of Teachers of English recently reported that grade retention has been identified in research studies as a "pernicious factor in the miseducation of language minority students. Not surprisingly, studies indicate that grade retention offers few benefits; for example, it decreases motivation, self-esteem , and level of achievement. . . And, more, pointedly, grade retention increases the likelihood of dropping out. Children with one grade retention have a 40–50 percent probability; those with two, a 65–75 percent probability; and those with three, a tragic 90 percent probability of dropping out." Gonzalez, *Language. Race, and the Politics of Educational Failure*, pp. 3–4 (citing U.S. Department of Education, Office of Educational Research and Improvement, *Dealing With Dropouts: The Urban Superintendents' Call to Action* (Washington, D.C.: U.S. Department of Education, 1987)); *See also*, J. Torres, *Equity in Education and the Language Minority Student* (NCBE Forum, 1991), pp. 1–3; E.M. Walker and S. Madhere, *Multiple Retentions: Some Consequences for Cognitive and Affective Maturation of Minority Students*, Urban Education, vol. 22, pp. 85–102 (1987); J.G. Bachman, S. Green, and I.D. Wirtanen, *Youth in Transition. Vol. 3. Dropping Out: Problem or Symptom?* (Ann Arbor, MI: Institute for Social Research, 1971).

140 The National Council of Teachers of English reports that approximately 5 million students with limited English proficiency are assessed by these exams each year. Gonzalez, *Language. Race. and the Politics of Educational Failure*, p. 3; *See also*, Peter Homel, *Bilingual Education and LEP Student's Transition to the Mainstream Class: A Summary Report* (Newark, NJ: The Office of Planning, Evaluation, and Testing, 1991). *See also*, General Accounting Office, *Limited English Proficiency: A Growing and Costly Challenge Facing Many School Districts*, January 1994 (Reporting that in one school district investigated by GAO, nonstandardized testing in students' native languages was used for initial screening procedures only. All later testing was based on the use of an English standardized test. GAO reported that: "District E assessed the English proficiency of all LEP students initially at the district's assignment center. In addition, the assignment center staff assessed native language oral, reading, and writing proficiency in Chinese, Khmer, Samoan, Spanish, Tagalog (Filipino), and Vietnamese. The district developed the nonstandardized tests used for these assessments for initial screening purposes only.

For example, in 1989 the Newark, New Jersey, school system implemented an experimental policy mandating that students with limited English proficiency who had participated in language remediation programs would be "mainstreamed," or transferred into school's regular education programs using a standardized test as the sole criterion for evaluation.[141] The New Jersey State Department of Education instituted a policy for determining the eligibility of students with limited English proficiency to exit the bilingual program and be placed in all-English speaking classrooms. Under this policy, eligibility for exiting the bilingual program was based solely on proficiency in English. In Newark, this determination was made on the basis of the Language Assessment Battery (LAB).[142] The system that had been employed previously in the Newark School District involved at least two other criteria in addition to English proficiency: achievement in English based on the California Test of Basic Skills (CTBS) and teacher judgment of the student's readiness for mainstreaming.[143]

Among the criticisms advanced by bilingual educators across the State at the time was that the single criterion system relied too heavily on the student's performance on a specific test. These educators argued that the LAB test by itself may not have been a valid measure of the general ability of the student to function in an all-English classroom. Given these concerns it became very important to follow the progress of the first group of students mainstreamed under the single criterion system.[144]

According to a statistical report prepared using statistics from a study on the experimental policy and released 1 year after it ended, the Newark school district found that after 1 year, contrary to original fears, the mainstreamed cohort appeared to have safely withstood the transition to an all-English-speaking classroom environment.[145] However, the report notes that the study failed to account for long-term effects and therefore could not determine whether those students maintained their level of performance beyond the 1989–1990 school year.[146] In addition, the report noted that students had been mainstreamed on the basis of cutoff points from their scores on the LAB test which were "quite high."[147] The report noted further that, therefore, "[i]t may be that those who qualify for mainstreaming under the single criterion system in a sense the 'cream,' the ones who are so far up the distribution on the LAB that they are also likely to be high in terms of English achievement."[148] Significantly, the report also notes in its conclusions that, "[o]n the other

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For Spanish-speaking LEP students served by bilingual programs, the district used a standardized test in Spanish to assess math and reading ability. Such tests were not available for students who spoke other languages; these students were tested, using English-language tests, once they had achieved a certain level of English proficiency. Ibid., p. 78.).

141 Peter Homel, *Bilingual Education and LEP Student's Transition to the Mainstream Class: A Summary Report* (Newark, NJ: The Office of Planning, Evaluation, and Testing, 1991), p. 1. (In introducing the report based on a study of the Newark school system decision to rely on a "single criterion" system, Homel states that: "This report constitutes a summary of the results from a follow-up study of the cohort of LEP students who were mainstreamed in the 1989–1990 school year in the Newark School System. . . This cohort constituted the first group of LEP students in the Newark School District to be mainstreamed according to the so-called "single-criterion" system which was mandated by the NJ State Department of Education in 1989.")

142 Ibid., p. 2.

143 Ibid. (The California Test of Basic Skills evaluates student's basic academic skills in reading, math, language, and study skills.)

144 Ibid.

145 Ibid., p. 24.

146 Ibid.

147 Ibid.

148 Ibid., p. 25.

hand, there may have been a large segment of students who do not do well on the LAB for various reasons, but who are nevertheless qualified to be mainstreamed *based on other criteria* Further study should be done to see what would be a more efficient combination of measures for determining a student's qualification for mainstreaming so that the process can be more equitable for all students."[149]

The results of the Newark Public Schools' study on the use of a standardized test as a single exit criterion for mainstreaming students with limited English proficiency do not indicate that this was a successful educational practice. As the report concluded, it was a possibility that the Newark students who were not mainstreamed may have been *qualified* for mainstreaming but the use of the LAB test by itself could not detect their abilities.[150] Clearly, it is extremely important for a school to establish as much certainty as possible with respect to determining any individual student's readiness for mainstreaming. The practice of using a single exit criterion to determine readiness for entry or reentry into the regular education program experimented within the New Jersey school system in 1989–90 represents one of many single criterion systems used by school districts across the country. The use of multiple criteria has become a universally endorsed practice among educators and policymakers.[151]

Although bilingual educators have continued to express serious concerns about the use of such systems, DOEd has not addressed successfully the need to require uniform, *adequate* guidelines based on multiple criteria for reevaluation assessments including exit criteria for mainstreaming.

OBEMLA's bilingual education programs operate under the provisions of the Education Department General Administrative Regulations (EDGAR) that apply to programs without regulations.[152] They provide little instruction and guidance to schools applying for grants under the Bilingual Education Act on such important aspects of educational programs for students with limited English proficiency as reevaluating students and using other measures to ensure appropriate assessments for educational placement.

Reevaluations, Monitoring, and Exiting Students

The September 1991 policy update addresses issues associated with reevaluating and regrouping periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development in its discussion of exit criteria for students with limited English proficiency. The policy update provides the following policy guidance on this issue:

> Once students have been placed in an alternative language program, they must be provided with services until they are proficient enough in English to participate meaningfully in the regular educational program. Some factors to examine in determining whether formerly LEP students are able to participate meaningfully in the regular educational program include: (1) whether they are able to keep up with their non-LEP peers in the regular educational program; (2) whether they are able to participate successfully in essentially all aspects of the school's curriculum without the use of simplified English materials; and (3) whether their retention-in-grade and dropout rates are similar to those of their non-LEP peers.
>
> Generally, a recipient will have wide latitude in determining criteria for exiting students from an alternative language program, but there are a few standards that should be met. First, exit criteria should be based on objective standards, such as standardized test scores, and the district should be able to explain why it has decided that students meeting those standards will be able to participate meaningfully in the regular classroom. Second, students should not be exited from the LEP program unless they can read, write, and comprehend English well enough to participate meaningfully

149 Ibid. [emphasis added].

150 Ibid.

151 *See* pp. 151–52; chap. 5 generally.

152 *See* DOEd Official Response, OBEMLA response, no. 4. *See also* 34 C.F.R. Part 75 (1996).

in the recipient's program. Exit criteria that simply test a student's oral language skills are inadequate. *Keyes*, 576 F. Supp. at 1518 (noting importance of testing reading and writing skills as well as oral language skills). Finally, alternative programs cannot be "dead end" tracks to segregate national origin minority students.[153]

This guidance on exit criteria appears as part of the policy update's discussion on proper program implementation, the second prong of the *Castaneda* test. The issue of exit criteria also may be associated with a program's results, since the academic achievement of exited students comprises the main measure under the third prong. Exit criteria are therefore an important aspect of OCR's inquiry. However, OCR does not offer any specific guidance to staff on criteria other than testing in making a determination as to the student's readiness for exiting an alternative language education program. For example, the policy does not refer to teacher assessments in this context. This lack of reference to multiple measures for such a crucial aspect of program implementation as exit criteria makes the policy discussion appear incomplete.

OCR documents detailing enforcement activities such as Letters of Findings and resolution agreements refer to problems associated with re-evaluating and regrouping periodically to reflect both the differential ability in various subjects and changes in achievement, performance, and development. For example, a letter of finding citing a violation against a New York school district addressed the issue of appropriate exiting from an alternative language program. The letter of finding states in pertinent part that:

> [t]he District has also established criteria for exiting the ESL program. Students identified as LEP are eligible for exiting the ESL program if they score above the 40th percentile on the SDRT and/or if they have been provided three years of ESL supported instruction. The Guidelines require that school districts must make a formal request to the New York State Commissioner of Education (the Commissioner) if they wish to extend an LEP student's time in an ESL program beyond the third year.[154]

The letter of finding notes further that of 62 students exited from the program in the school year reviewed, only 36 of them had scored at the 40th percentile on SDRT exam.[155] Nonetheless, the district exited these students without making a request to the Commissioner for an extension of the 26 students who had scored below the 40th percentile in the program.[156] Finally, the letter of finding notes that:

> [d]istrict ESL staff informed OCR that students who exit the ESL program without achieving a SDRT score above the 40th percentile are not tracked to ensure that they receive appropriate remediation. Additionally, OCR determined that during the school year reviewed the secondary school drop out rate for LEP students was significantly higher than that for remaining District student population.[157]

The evidence of the higher dropout rates makes effective use of the third prong of the *Castaneda* test in showing that the program results were not effective.[158] Clearly, the school district was not administering its own procedures properly by not requesting extensions in the program for those students scoring below the 40th percentile. Moreover, the higher dropout rates for students with limited English proficiency strongly suggest that

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153 September 1991 policy update, pp. 6–7.

154 Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, letter to Alan G. Hernandez, Superintendent, Uniondale Public Schools, Union Free School District, Uniondale, NY, re: Case No. 02–92–5005, Dec. 27, 1993, p. 3.

155 Ibid.

156 Ibid.

157 Ibid.

158 648 F.2d 989, 1010.

the failure to implement these procedures properly was operating to affect these students adversely.

However, because this letter of finding does not provide a thorough analysis of OCR policy on the exit criteria issues, it fails to afford the school district an opportunity to fully disseminate OCR policy. The analysis presented by OCR in its letters of finding is the most important written contact between OCR and the school district. However, the analysis presented in this letter of finding does not contain any reference to OCR's policy of recommending the use of multiple criteria when assessing students readiness for exiting an alternative language education program. It makes no mention of policy guidance on exit criteria from the September 1991 policy update as standards that should be met, such as the necessity for exit criteria that test all four English language proficiency skill areas. Nor does the letter of finding contain any information on whether, as the September 1991 policy update indicates, the school district was able to "explain why it has decided that students meeting those standards [the school district's exit criteria] will be able to participate meaningfully in the regular classroom."[159]

It is therefore unclear whether OCR provided any information to the school district as to the other criteria, if any, being used by the school district as exit criteria from the ESL program. In other words, the letter of finding did not provide information as to whether *other exit criteria* were being employed by the school district. In addition, if the test score was the only exit criterion, OCR staff should have included an assessment as to whether the exit criterion of a 40 percent cutoff score was adequate to determine whether the exited students possessed a level of English proficiency high enough to participate in the school's regular education program. In particular, it is unclear from the letter of finding whether OCR found that the test alone measured all four areas of English language proficiency—reading, writing, speaking, and understanding—required in the September 1991 policy update.[160] The information provided in the letter of finding did not address these crucial issues of adequacy of program implementation. While the evidence of higher dropout rates suggests a connection between the failure to properly administer the program, it remains unclear whether the program's procedures themselves, specifically the exit criteria, were sufficient to determine the effectiveness of the ESL program.

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159 September 1991 policy update, p. 7.

160 September 1991 memorandum, p. 7.

Chapter 8

Evaluating and Allocating Teachers, Facilities, and Other Resources Among Educational Programs

Evaluating the Training and Certification of Teachers and Allocating Teachers Before the Start of and During the Implementation of Educational Programs

Background

Teachers play a vital role in the development and implementation of sound programs that adequately meet the educational needs of students with limited English proficiency.[1] Schools therefore must place a heavy emphasis on the quality of teacher training and allocation necessary to implement high quality educational programs. In turn, programs supported by adequately allocated, well-trained teachers, will help to ensure equal educational opportunity for students with limited English proficiency. The unfortunate reality of severe teacher and teacher-aide shortages has presented major problems for schools. The manner in which school districts have responded to teacher and teacher-aide shortages sometimes has created further segregative effects and inadequate language instruction.

The presence of provisions relating to teacher training and certification and allocation in Federal civil rights education statutes, regulations, and policies indicates its importance in the education of students with limited English proficiency. OCR's most recent policy memorandum relating to the provision of equal educational opportunity for students with limited English proficiency requires that school districts "provide the staff necessary to implement their chosen program properly within a reasonable period of time" and discusses some minimum qualifications for teachers in various educational programs.[2] Litigation in the Federal courts dealing with civil rights compliance issues affecting students with limited English proficiency also has focused on teacher qualifications and credentials as important aspects of compliance under Title VI and the Equal Educational Opportunities Act.[3]

In addition, the Bilingual Education Act, in its findings, policy, and purpose, states the following with regard to the need for quality teacher training:

> The Congress finds that . . . (5) limited English proficient children and youth face a number of challenges in receiving an education that will enable such children

1 *See* E. William Strang and Elaine Carlson, *Providing Chapter 1 Services to Limited English-Proficient Students*, (Rockville, MD: Westat, Inc., 1991). This report, prepared under contract by the Department of Education's Office of Policy and Planning, made the following recommendation with respect to teacher training in Title I (formerly known as Chapter 1): "Staff training should be provided by state or local agencies to enhance the ability of Chapter 1 personnel to meet the basic skills needs of language-minority LEP students for whom bilingual instruction is impractical." Ibid., p. 67.

2 *See* Michael L. Williams, Assistant Secretary for Civil Rights, memorandum to OCR Senior Staff, "Policy Update on Schools Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP Student)," Sept. 27, 1991 (hereafter cited as September 1991 memorandum), p. 4.

3 *See* Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989); Keyes v. Denver Sch. Dist. No. 1, 576 F. Supp. 1503 (D. Colo. 1983), *aff'd in part, remanded*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

and youth to participate fully in American society, including—. . . (D) a shortage of teachers and other staff who are professionally trained and qualified to serve such children and youth. . . .[4]

Moreover, the act requires that teacher qualifications outlined by school districts submitting applications for Federal funds meet with the approval of the Secretary of Education before approval of the application.[5] Finally, the act contains several programs addressing the need for a greater emphasis on teacher training and certification. These programs include the following:

TRAINING FOR ALL TEACHERS PROGRAM. (a) Purpose.—The purpose of this section is to provide for the incorporation of courses and curricula on appropriate and effective instructional and assessment methodologies, strategies and resources specific to limited English proficient students into preservice and inservice professional development programs for teachers, pupil services personnel, administrators, and other education personnel in order to prepare such individuals to provide effective services to limited English proficient students.[6]

BILINGUAL EDUCATION TEACHERS AND PERSONNEL GRANTS. (a) Purpose.—The purpose of this section is to provide for—(1) preservice and inservice professional development for bilingual education teachers, administrators, pupil services personnel, and other educational personnel who are either involved in, or preparing to be involved in, the provision of educational services for children and youth of limited-English-proficiency;. . .[7]

BILINGUAL EDUCATION CAREER LADDER PROGRAM. (a) Purpose.—The purpose of this section is—(1) to upgrade the qualifications and skills of noncertified educational personnel, especially educational paraprofessionals, to meet high professional standards, including certification and licensure as bilingual education teachers and other educational personnel who serve limited English proficient students, thorough collaborative training programs operated by institutions of higher education and local and State educational agencies;. . .[8]

Education research overwhelmingly indicates that the better trained the teacher, the more likely that students will be successful in overcoming their language barriers and achieving academic success. Staff development, certification, and appropriate allocation of teachers must be primary objectives of education policy. Without these as primary objectives, a number of problems may ensue. First, there is the problem of severe teacher shortages for students with limited English proficiency. Second, when teachers are not adequately trained, their ability to make judgments as to the placement and evaluation of students is seriously impaired. Poor teacher judgments result in inappropriate placements that can have long-term adverse affects on a student's educational success and future.

Providing Adequate Training and Requirements for Teacher Certification

The educational needs of students largely dictate the kinds of skills and abilities their teachers must possess.[9] In the case of students with lim-

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4 20 U.S.C. § 7402 (a)(5)(D) (1994).

5 The act states that: "(h) Approval of Applications.—An applicant for approval under this subpart may be approved only if the Secretary determines that—"(1) the program will use qualified personnel, including personnel who are proficient in the language or languages used for instruction." 20 U.S.C. § 7426(h)(1) (1994).

6 20 U.S.C. § 7472(a) (1994).

7 20 U.S.C. § 7473(a)(1) (1994).

8 20 U.S.C. § 7474(a)(1) (1994).

9 *See* Heidi Dulay and Marina Burt, "The Relative Proficiency of Limited English Proficient Students," in J. Alatis, ed., *Current Issues in Bilingual Education* (Washington, D.C.: Georgetown University Press, 1980) p. 187 (noting that depending on whether students served by alternative language programs actually have superior proficiency in English or are equally limited in their English and native language proficiency, different instructional approaches must be used, and "changes in instructional approach invariably entail different requirements for teachers,. . .").

ited English proficiency, who require a special instructional program, a teacher training program must develop effectively the necessary skills and abilities in at least two important areas. First, an adequate teacher training program should enable the prospective teacher to identify properly the students who require placement in programs designed to address language barriers resulting from limited English proficiency. Second, the training program should provide access to the skills and abilities required to teach the particular educational program chosen by the school to remedy the student's language barriers effectively.

The teacher's ability to assess accurately a student's level of language proficiency in English and his or her native language is of crucial importance. This is so because schools rely heavily on teacher assessments in placing students with limited English proficiency.[10] Statistics show that teacher training in this area is frequently inadequate.[11] Teacher training on assessment and evaluation measurements often includes "little more than what teachers can learn from large-scale standardized tests, such as the meaning of students' percentile ranks. . . . When schools of education do offer assessment courses, they rarely delve into ways teachers can build tests or use exams and less formal observations to guide instruction by identifying students' strengths and weaknesses."[12] Inadequate teacher training often results in mislabeling of students.[13] This is particularly problematic in the case of students with limited English proficiency, whose placement, as the Supreme Court noted in *Lau*, may mean the difference between comprehension and noncomprehension.[14]

The second area of importance, the ability to meet the program goals set for student participants, requires differing levels and kinds of skills and abilities. Since there are numerous kinds of educational programs designed specifically for the instruction of such students, teachers in these programs may possess a wide range of different skills and abilities. Some must possess bilingual skills; others might be required to possess at least some proficiency in the native language of the students. Adequate evaluation and allocation of teachers among educational programs requires teachers to be appropriately skilled and able to teach the particular instructional program for which they have been assigned. Its importance as a means of providing students with limited English proficiency with equal access to educational opportunities is reflected in the numerous research studies that have focused on improving

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10 Gary Burnett, *The Assessment and Placement of Language Minority Students*, Digest #89, (New York, NY: ERIC Clearinghouse on Urban Education, Institute for Urban and Minority Education, Teachers College Columbia University, April 1993), p. 1 ("In most cases, information from teachers and the Home Language Survey act as screening mechanism for schools to determine if further evaluation is necessary.").

11 For example, according to William Schafer, chairman of a National Council on Measurement in Education (NCME) panel examining preservice training in assessment, only about one-half of college teacher education programs require prospective teachers to take a course on assessment. Moreover, only roughly one-half of teachers working today have taken even one course in assessment even though teachers spend at least one-third of their professional time testing and evaluating students in one way or another. "Teachers Largely Untrained," *Education Daily*, vol. 29, no. 39 (Feb. 28, 1996), p. 1.
According to Richard Stiggins, president of the Assessment Training Institute (ATI), widely regarded as a top authority on the subject of teacher training on evaluation and assessment procedures, "[t]he problem from teachers' point of view is that they have no place to turn for help because principals and many other administrators are equally uninformed about evaluating students or tapping expertise on the subject." Ibid., pp. 1, 3.

12 Ibid., p. 3 (quoting William Schafer, chairman of a National Council on Measurement in Education (NCME) panel and an education professor at the University of Maryland at College Park).

13 Xavier Briand, "Teacher Observations Key in Bilingual Assessment," *Education Daily*, vol. 29, no. 64 (Apr. 3, 1996), p. 5 (quoting remarks of bilingual education specialist Sandra Fradd, an associate professor of education at the University of Miami, at the 1996 annual meeting of the Council for Exceptional Children). According to *Education Daily*, Fradd also noted that "[n]obody is training teachers to look for these things." Ibid.

14 414 U.S. 563 (1974).

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teacher and teacher-aide training and teacher-student relations.[15]

In 1989, at the annual conference of the National Association for Bilingual Education (NABE), members approved a formal resolution calling for the development of national standards for the preparation of bilingual/multicultural teachers.[16] The resolution noted that quality education for language minority students can be realized only when the larger school environment addresses the unique educational needs of these students.[17] Following the meeting, NABE developed six standards for teachers in the following categories: (1) institutional resources, coordination, and commitment; (2) recruitment, advisement, and retention of potential teachers; (3) bilingual/multicultural coursework and curriculum; (4) language proficiency in English and non-English languages and abilities to teach in those languages; (5) field work and practicum experiences in bilingual/multicultural classrooms. Specific objectives and 10 to 15 indicators are provided for each of the six standards.[18]

Whether it is a bilingual, English-as-a-Second Language, immersion program, or other kind of program, the teacher's skills and abilities must match the program's requirements and meet the needs of the students in the program. Resource guides and other technical assistance materials explaining or providing a background for these programs may be very useful, particularly for teachers and administrators who do not have a strong background in these areas. The U.S. Department of Education's (DOEd's) Office of Educational Research and Improvement (OERI) funds various technical assistance materials on the development of educational programs for students with limited English proficiency. These materials often are designed for use by school administrators and teachers working in this area. Some of these materials, although not funded by OERI, have been gathered by OERI and are available through its Education Resources Information Center (ERIC). One example of such a document is a 1991 resource guide on bilingual education. This guide, entitled *Bilingual Education: A Resource Guide for Educators and Administrators*, provides an introduction to civil rights issues relating to students with limited English proficiency, focusing on the parallel development of civil rights and education program funding statutes that has characterized Federal policy initiatives in this area. It, therefore, reflects an emphasis on important background information that

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15 *See* Javier Colon et al., *Entitlements of Latino Students in the Massachusetts Public Educational System: Some Legal and Policy Considerations. Publication No. 90-02* (Boston, MA: Massachusetts Univ., Mauricio Gaston Inst. for Latino Community Development and Public Policy, 1990) (analyzing entitlements designed to guarantee equal educational opportunity rights for Latino students in Massachusetts public schools, review policy debates on these issues, and recommend areas for research. Studies are recommended that accomplish the following: (1) identify the general support levels for bilingual education; (2) document quality program implementation; (3) show how future teachers are being trained to work with language minority students; (4) examine restructuring efforts to identify practices that stigmatize Latino children; (5) test the application of the theory of cultural discontinuities with Latino children; and (6) identify a curriculum that is in harmony with the culture of Latino students.).

See also Judy Goodwin et al., *A Study of the Bilingual Instructional Support Component in New Instructional Model Schools* (Philadelphia, PA: Philadelphia School District, Office of Assessment, 1991) (assessing the bilingual instructional support component used in selected Philadelphia schools and recommending providing training to tutors used for bilingual instructional support in the Philadelphia school district.).

See also John E. Steffens, "Will the LEP Train Reach Its Destination? Designing the IHE Teacher Training Program for Specific LEP Student Instructional Needs," in *Focus on Evaluation and Measurement*, vols. 1 and 2, Proceedings of the National Research Symposium on Limited English Proficient Student Issues (2nd, Washington, DC: September 4–6, 1991) (discussing designing an individual higher education teacher training program that focuses on the instructional needs of students with limited English proficiency.).

16 National Association for Bilingual Education, *Professional Standards for the Preparation of Bilingual/Multicultural Teachers* (Washington, D.C.: National Association for Bilingual Education, 1989).

17 Ibid.

18 Ibid.

teachers and school administrators need to perform at a high level in developing and implementing educational programs for students with limited English proficiency.[19]

Teacher skills required will vary since there are numerous different kinds of educationally sound instructional programs for students with limited English proficiency. For example, an adequate teacher training and certification programs for bilingual education should include bilingual proficiency whereas bilingual proficiency may not be required for teaching ESL or other educational programs that do not utilize the student's native language in instruction. In the case of teachers of ESL programs, research has revealed a number of problems associated with inadequate teacher training.[20] Among the problems identified in one research study are:

> 1) the teachers' beliefs about language-minority students and their programs may be based on hearsay and misinformation; (2) the teachers do not vary their planning for this population, but frequently vary lesson implementation; (3) selection of instructional practices may be based on naive notions of language proficiency and the demands of the mainstream classroom; and (4) the teachers draw on intuitive wisdom because of lack of preservice education or staff development regarding language-minority students.[21]

Certain skills and abilities cut across all of these different program approaches. Teachers of students with limited English proficiency, regardless of the kind of program, need certain basic skills and abilities, including an awareness of cultural and linguistic differences. Among the salient characteristics of effective schools are teacher expectations and behaviors that demonstrate to the students that they must obtain at least some minimal level of mastery.[22] Unfortunately, many teacher training programs fail to recognize the importance of these skills in teaching such students. The ability of teachers working with students with limited English proficiency to communicate with these students in their native language can enhance the effectiveness of the educational program in producing higher rates of academic success.

Limited Staffing and Funding and Inefficient Distribution Allocation of Teachers

Research on the shortage of bilingual teachers reveals an enormous need. The number of teach-

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19 The guide states in its preface that its purpose is threefold: "to introduce the user to government documents and briefly explain how one may obtain and utilize them; to provide a brief background on the issue of bilingual education; and lastly, to provide and explain a listing of relevant documents upon which to build their own educational program for limited English proficient students." Karen Shockey, *Bilingual Education: A Resource Guide for Educators and Administrators* (Springfield, VA: ERIC Document Reproduction Service, 1991), p. 5. The guide offers an introduction to the legal and educational foundations of educational programs designed to assist students with limited English proficiency in learning English. It provides an "Introduction to Government Information" section which includes information on how to find government documents, the government's depository library system, and the Government Printing Office. It also includes legal background covering the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965, the Bilingual Education Act of 1968, *Lau v. Nichols*, and the Equal Educational Opportunities Act of 1974.

20 *See generally* Nancy Clair, "ESL Teacher Educators and Teachers: Insights from Classroom Teachers with Language-Minority Students," paper presented at the 27th Annual Meeting of the Teachers of English to Speakers of Other Languages (Atlanta, GA: Apr. 13–17, 1993).

21 Ibid., p. 1.

22 Kathryn J. Lindholm, "Two-Way Bilingual/Immersion Education: Theory, Conceptual Issue, and Pedagogical Implications," pp. 195–220 in Raymond V. Padilla and Alfredo H. Benavides, eds., *Critical Perspectives on Bilingual Education Research* (Tempe, Arizona: Bilingual Press, 1991), p. 201 (hereafter cited as Lindholm, "Two-Way Bilingual/Immersion Education"). *See also* Eugene Garcia, "Teachers for Language Minority Students: Evaluating Professional Standards, in Focus on Evaluation and Measurement," in *Focus on Evaluation and Measurement*, vols. 1 and 2, Proceedings of the National Research Symposium on Limited English Proficient Student Issues (2nd, Washington, DC: Sept. 4–6, 1991) (arguing that "'who' does the teaching is of major importance regardless of the language minority education model being implemented.").

ers needed has grown from 120,000 in 1976 to a projection of 200,000 for the year 2000. This projection includes teachers of all languages with Spanish being the highest percentage (72 percent). When broken down by State the severity of the problem becomes even clearer. California has projected that its public schools will require another 17,000 more teachers by the year 2000.[23] With inadequate numbers of teachers in many school districts, schools cannot provide enough staff to meet the needs of integrated classrooms. Ever increasing numbers of students from language minority backgrounds continue to exacerbate this problem. Some school districts have reacted to the shortage of teachers trained to teach students with limited English proficiency by grouping such students in overly large classes where they receive alternative language instruction but are effectively segregated from their English-proficient peers. Other school districts, however, have integrated students with limited English proficiency into the regular classroom, without providing them with alternative language instruction, effectively denying them a comprehensibleeducation.[24]

The California State Department of Education has recommended several long-term strategies to increase the supply of teachers in educational programs for students with limited English proficiency.[25] A 1991report prepared by the California State Department of Education Task Force on Selected LEP issues made recommendations for the State, the State university system, and local educational agencies in addressing the predicted severe shortage of teachers for students with limited English proficiency by the late 1990s.[26] Among the recommendations included in this report were: 1) focusing on youths who themselves have been or currently are among the population of students with limited English proficiency because these students can provide "a large potential pool from which to draw candidates if incentives can be developed and training opportunities made flexible enough to accommodate potential candidates' needs and abilities;"[27] 2) overcoming the present lack of emphasis for learning foreign languages in school in order to encourage students to begin studying at least one foreign language in elementary school so that there is "a reasonable chance of [them] attaining bilingual proficiency by the time they are making career decisions;"[28] and 3) "designing, implementing, and publicizing a plan to recruit potential bilingual teachers from junior high school students" through cooperative efforts between the State educational agency, the State universities, and the local educational agencies.[29]

Teacher Training, Certification and Allocation

In fashioning its compliance standards, evaluating schools' compliance, and guiding its enforcement activities, including compliance reviews and complaint investigations, OCR addresses issues relating to the evaluation and allocation of teachers according to the standards set forth in its

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23 Ruben Donato and Herman Garcia, "Language Segregation in Desegregated Schools: A Question of Equity," *Equity and Excellence*, vol. 25, nos. 2–4 (Winter 1992), p. 97.

24 Ibid.

25 *See* The Task Force on Selected LEP Issues, California Department of Education, *Remedying the Shortage of Teachers for Limited-English-Proficient Students* (Sacramento, CA: California Department of Education, 1991).

26 *See* The Task Force on Selected LEP Issues, California Department of Education, *Remedying the Shortage of Teachers for Limited-English-Proficient Students* (Sacramento, CA: California Department of Education, 1991), p. 15.

27 *See* The Task Force on Selected LEP Issues, California Department of Education, *Remedying the Shortage of Teachers for Limited-English-Proficient Students* (Sacramento, CA: California Department of Education, 1991), p. 15.

28 The Task Force on Selected LEP Issues, California Department of Education, *Remedying the Shortage of Teachers for Limited-English-Proficient Students* (Sacramento, CA: California Department of Education, 1991), p. 15.

29 The Task Force on Selected LEP Issues, California Department of Education, *Remedying the Shortage of Teachers for Limited-English-Proficient Students* (Sacramento, CA: California Department of Education, 1991), p. 16.

policy guidance in the May 1970 and September 1991 memoranda.[30] The September 1991 memorandum includes a lengthy discussion on "staffing requirements." The memorandum states:

> Districts have an obligation to provide the staff necessary to implement their chosen program properly within a reasonable period of time. Many states and school districts have established formal qualifications for teachers working in a program for limited-English-proficient students. When formal qualifications have been established, and when a district generally requires its teachers in other subjects to meet formal requirements, a recipient must either hire formally qualified teachers for LEP students or require that teachers already on staff work toward attaining those formal qualifications. *See Castaneda*, 648 F. 2d at 1013. A recipient may not in effect relegate LEP students to second-class status by indefinitely allowing teachers without formal qualifications to teach them while requiring teachers of non-LEP students to meet formal qualifications. *See* 34 C.F.R. § 100.3(b)(ii).
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> Whether the district's teachers have met any applicable qualifications established by the state or district does not conclusively show that they are qualified to teach in an alternative language program. Some states have no requirements beyond requiring that a teacher generally be certified, and some states have established requirements that are not rigorous enough to ensure that their teachers have the skills necessary to carry out the district's chosen educational program.[31]

OCR recognizes the crucial importance of school districts providing well-trained staff in developing and implementing educational programs, although its policy guidance may not offer enough specificity in defining important terminology related to compliance standards. The September 1991 memorandum gives its most thorough policy guidance in the area of staffing requirements. It places a heavy emphasis on teacher training and certification. OCR's recognition of the importance of teacher qualifications as crucial to effective program implementation and, in turn, civil rights compliance, appears most evident in the September 1991 memorandum's discussion of staffing requirements for bilingual education programs. For example, the memorandum clearly states the requirement that bilingual education programs must be staffed with bilingual teachers to meet *Lau* compliance standards. In particular, the memorandum notes that for a school district to implement a bilingual education program properly, "at a minimum, teachers of bilingual classes should be able to speak, read, and write both languages, and should have received adequate instruction in the methods of bilingual education."[32] In addition, the memorandum states that OCR requires a recipient school to be able to show that it has determined that its bilingual teachers have these skills.

The memorandum does not, however, offer any further detail as to the *level* of the teacher's language abilities.[33] It does not state, for example, whether a teacher must be a fluent speaker of the native language of his or her students or if some lesser proficiency level will suffice. Neither does the memorandum offer any definition or examples that might help to define the meaning of the term "adequate instruction in the methods of bilingual education." However, in supporting its position that recipient school districts must clearly determine the language proficiencies of teachers in bilingual programs, the memorandum cites language in *Keyes v. Denver School District No. 1*,[34] where the court criticized the school district "for designating teachers as bilingual based

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30 *See* Cathy H. Lewis, Acting Senior Enforcement Officer for the Western Part of the United States, Office for Civil Rights, U.S. Department of Education, interview in Washington, D.C., June 14, 1996.

31 September 1991 memorandum, p. 4.

32 September 1991 memorandum, p. 5 (quoting Keyes v. Denver Sch. Dist. No. 1, 576 F. Supp. 1503, 1516–1517 (D. Colo. 1983)).

33 The memorandum cites *Castaneda* as support for its general position that bilingual teachers must possess bilingual capabilities ("A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with the day-to-day responsibility for educating these children are termed 'qualified' despite the fact that they operated in the classroom under their own unremedied language disability." September 1991 memorandum, p. 5 (citing 648 F.2d at 1013)).

on an oral interview and for not using standardized tests to determine whether bilingual teachers could speak and write both languages."[35] The *Keyes* reference at least offers some indirect guidance as to OCR's position on what might constitute an effective means for schools to make this determination.

Elsewhere, the memorandum offers more detailed guidance to OCR staff in conducting *Lau* compliance activities. For example, with respect to other educational programs, such as ESL or structured immersion programs, the memorandum states that "the recipient should have ascertained that teachers who use those methods have been adequately trained in them."[36] Here, however, the memorandum offers examples of adequate training. It states that "[t]his training can take the form of in-service training, formal college coursework, or a combination of the two."[37] These examples serve to define the meaning of the term "adequate," thereby offering OCR staff clearer guidance in conducting compliance activity than that given for teacher qualifications in the bilingual education program context.

The memorandum notes that controversy exists as to whether monolingual teachers can provide effective ESL instruction to students with limited English proficiency. Compliance standards relied on by OCR reflect Federal judicial opinions that have addressed legal issues in this area. Two important decisions are referred to in the September 1991 memorandum: *Teresa P. v. Berkeley Unified School District*,[38] and *Keyes v. Denver School Dist. No. 1*[39] The September 1991 memorandum states that: "ESL teachers need not be bilingual if the evidence shows that they can teach effectively without bilingual skills."[40] It cites two cases, *Teresa P.* and *Keyes*, in illustrating a tension in the Federal courts as to the appropriate standards of teacher competence required in meeting the second prong of the *Castaneda* standard. In *Teresa P.*, the district court found that students with limited English proficiency can be taught English effectively by monolingual teachers whereas the court in *Keyes* found that "[t]he record shows that in the secondary schools there are designated ESL teachers who have no second language capability. There is no basis for assuming that policy objectives of the [transitional bilingual educational] program are being met in such schools."[41] The September 1991 memorandum cites *Teresa P.*, as follows:

> finding that district had adequately implemented its language remediation program even though many of its bilingual and ESL teachers did not hold applicable credentials; court noted that district probably could not have obtained fully credentialed teachers in all language groups, district was requiring teachers to work toward completion of credential requirements as a condition of employment, record showed no differences between achievement of students taught by credentialed teachers and achievement of students taught by uncredentialed teachers, and district's financial resources were severely limited.[42]

In conducting its *Lau* compliance reviews, OCR frequently encounters problems associated with staffing requirements standards.[43] In addressing

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34 576 F. Supp. 1503.

35 September 1991 memorandum, p. 4 (citing 576 F. Supp. at 1516–17).

36 September 1991 memorandum, p. 5.

37 Ibid.

38 724 F. Supp. 698 (N.D. Cal. 1989).

39 576 F. Supp. 1503.

40 September 1991 memorandum, p. 5.

41 576 F. Supp. at 1517.

42 September 1991 memorandum, p. 4, n. 4 (citing 724 F. Supp. at 714).

43 Angela D. Martinez, National *Lau* Facilitator, U.S. Department of Education, Office for Civil Rights, telephone interview,

the numerous shortages of qualified teachers among the school districts it evaluates, OCR has encountered school districts whose problem in this regard lies in a failure to determine whether they have staff that possess the required qualifications. For example, some schools have staff with qualifications to teach ESL or bilingual education programs, but the school administration remains unaware of these teachers' qualifications either because the need is not sufficiently publicized among staff or because staff choose not to participate in these programs. Because of this reported inefficiency in matching trained staff with programs, OCR requests that schools survey their staff not just for qualifications alone but for teacher interests. In this way, the school might discover qualifications that would otherwise have gone unnoticed and can attempt to redirect a teacher resource for use in an ESL or bilingual program. According to OCR's national *Lau* facilitator, "[w]e've gone on a number of investigations where teachers *were* qualified, they had the endorsement or the certification in ESL or bilingual education or sufficient training, but districts didn't know it. So we say 'survey your staff not only for what qualifications they have but for what interests they have.'"[44]

OCR incorporates this emphasis on teacher training and qualifications in part through its technical assistance efforts with school districts. The Headquarters *Lau* team in its recently released "Promising Practices and Programs for Serving National Origin Limited English Proficient Students," describes teaching qualifications and teaching techniques used by various school districts around the country. For example, the document describes teacher training and teaching techniques used in a two-way bilingual immersion program in California, called Project Components. Project Two-Way is an academically based program, in which the target language (Spanish) is used as the vehicle for instruction. Instructional delivery is monolingual at all times, allowing for maximized concentration in both languages. Monthly thematic units are developed, integrating the curriculum, making the target language more meaningful for the student. Teachers use a multitude of second language acquisition skills to make language and content understandable for all students. Teachers exchange classes for the English portion of the day, so that the students identify one teacher with English instruction and another with Spanish instruction. All teachers have bilingual teaching credentials, and receive extensive training in immersion instruction. Resource teachers and instructional aides also provide support. Ongoing training is provided to teachers by the magnet resource teacher, outside trainers, and by the district's staff development department. Specific teaching techniques used in the classroom include: second language acquisition following a natural approach; sheltered instruction; cooperative learning strategies; and teacher expectation of student achievement.[45] Such technical assistance documents provide an important means for OCR to assist school districts not only in understanding their legal responsibilities but in offering ideas to school administrators and staff about how they can develop and implement effective alternative language programs.

The seven programs outlined in the OCR *Lau* Team's March 1996 "Promising Practices" emphasize the importance of teacher training and certification in developing effective programs. For example, OCR's "Promising Practices" include a description of a school in El Paso, Texas, that carefully identifies the required qualifications and allocation of teachers in the program. This description states:

> All the classes within each grade level are assigned the same block of time. The five first-grade classes, for

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June 24, 27, 1996 (hereafter cited as Martinez interview) (stating that: "One of the first things we ask school districts to do in their agreement is to survey their staff.").

44 Martinez interview.

45 *See* U.S. Department of Education, Office for Civil Rights, "Promising Practices and Programs for Serving National Origin Limited English Proficient Students," prepared by *Lau* Team, March 1996.

example, are divided among the five classroom teachers and three resource teachers, allowing more intensive and individualized instruction. Two resource teachers, who were hired with Chapter I funding, offer a range of added help and enrichment without the stigma of a pull-out program. . . All teachers for the bilingual education program and ESL instruction are bilingual, have bilingual and ESL certification, and have received specialized training in language development. Staff development emphasizes the improvement of the School's instructional program in those areas where student performance is weakest, as reflected in the results of the TASS test.

The district's bilingual office also works closely with the staff development office to ensure that staff development activities are coordinated and support the same methods. For example, whole language strategies, a literature-based curriculum, and cooperative learning have been themes of both district-wide staff development activities and the bilingual program. The district's bilingual office also provides a great deal of staff development on whole language literacy and ESL techniques for all classroom teachers. All teachers at the School, in addition to those in the bilingual program, are being trained in suitable instructional techniques for ESL and "sheltering" English instruction.

In addition to staff development, teacher collaboration is an important feature of the School's instructional program. Teachers for both students with limited English proficiency and English-proficient students in each grade meet weekly to coordinate teaching strategies and curriculum for that grade level. This collaboration ensures a common curriculum that is challenging to all students, regardless of proficiency in English.[46]

In addition, the description of this program identifies the following "multiple support structures for LEP students:"

—Tutoring and Summer School Programs: With support from Chapter I funding, teachers provide tutoring twice a week for 45 minutes after regular school hours for students who need extra support. The School also participates in the national Odyssey of the Mind program, which involves teams of students in discussion groups who collaborate in designing a vehicle to take them on an imaginary journey. Students also participate in a literature-based program sponsored by the University Interscholastic League. Activities in both these programs are bilingual. Also, about 40 percent of the School's students attend a four-week summer school program conducted by the teachers for students who need extra help for English proficiency or for other academic needs. This program has provided a way to extend language development for LEP students over the summer months.[47]

This description of the El Paso program indicates an emphasis on teachers as resources in the development and implementation of an effective educational program. Such an emphasis reflects the signal importance of a strong and well-developed teacher training program in ensuring access to quality educational programs for students with limited English proficiency that can provide equal educational opportunities. OCR therefore has a very useful outreach tool in documents such as this one on "promising practices." OCR should ensure that other school districts make effective use of this document by 1) assisting school districts to disseminate this "promising practices" document and continuing to supply more outreach and education documents addressing the importance of qualified teachers in providing appropriate educational programs; and 2) assisting school districts reviewing this "promising practices" to implement high-quality teacher training programs and professional development programs in order to provide the most effective educational programs.

In general, OCR's letters of finding since 1990 have provided school districts with a thorough assessment of program practices associated with the evaluation and allocation of teachers in educational programs for students with limited English proficiency.[48] OCR focuses closely on the

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46 OCR, "Promising Practices for LEP Students," pp. 2–3.

47 Ibid., pp. 3–4.

48 *See generally* Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Robert Holster, Superintendent, Passaic Public School District, Passaic, NJ, re: Case No. 02–94–5006, June 29, 1995; Taylor D.

qualifications and training of teachers in these educational programs in evaluating school districts' Title VI compliance. OCR specifically focuses on whether teachers have the appropriate credentials for the kind of program the school district is implementing.

Evaluating and Allocating Facilities and Other Resources Before the Start of and During the Implementation of Education Programs

Background

Evaluating and allocating facilities and other resources before the start of and during the implementation of educational programs is crucial to promoting equal educational opportunity for students with limited English proficiency. Such students are entitled to the same access to facilities accorded English-proficient students. The importance of evaluating and allocating facilities and other resources before the start of and during the implementation of educational programs arises from the entitlement to equal access set forth in the Bilingual Education Act; DOEd's and the U.S. Department of Justice's civil rights compliance regulations, policies, guidelines, and activities; and legal/educational scholarship on equal educational opportunity.

Federal education program funding and civil rights statutes, regulations, and policies provide strong support for equitable allocations of facilities and resources across educational programs. For example, the Bilingual Education Act emphasizes as part of its purpose the importance of educating "limited English proficient children and youth to meet the same rigorous standards for academic performance expected of all children and youth, including meeting challenging State content standards and challenging State student performance standards. . . "[49] To meet these standards, schools must adequately evaluate and allocate facilities before the start of and during the implementation of educational programs. Grantees receiving aid under the Bilingual Education Act are permitted to spend funds on resources and materials, such as "educational technology."[50] Four particular grant programs under which funds can be used for resources and materials include: Program Development and Implementation Grants;[51] Program Enhancement Grants;[52]

August, Regional Director, Region VI, Office for Civil Rights, U.S. Department of Education, to Superintendent, Lubbock Independent School District, Lubbock, TX, re: Case No. 06945006, Aug. 4, 1995; John Palomino, Regional Director, Region IX, Office for Civil Rights, U.S. Department of Education, to Kulwant Singh Sidhu, Superintendent, Mendota Unified School District, Mendota, CA, re: Case No. 09–93–1196, Feb. 15, 1994; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Nat Lommori, Superintendent, Lyon County School District, Yerington, NV re: Case No. 10945005, July 17, 1995; Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to James B. Clarke, Jr., Superintendent, Linden Public School District, Linden, NJ, re: Case No. 02–93–5002, Mar. 10, 1995; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to John E. Bierwirth, Superintendent, Portland School District, Portland, OR, re: Case No. 10945004, Dec. 27, 1994; Gary D. Jackson, Regional Director, Region X, Office for Civil Rights, U.S. Department of Education, to Steve Wisely, Superintendent, Medford School District, Medford, OR, re: Case No. 10945002, Oct. 28, 1994; Taylor D. August, Regional Director, Region VI, Office for Civil Rights, U.S. Department of Education, Dee Carter, Superintendent, Carrizo Springs Consolidated Independent School District, Carrizo Springs, TX, re: Case No. 04-93-5010, Sept. 30., 1994; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Jim B. Hensley, Superintendent, Kansas City Unified School District #500, Kansas City, KS 66101, Case No. 07925004, July 29, 1993; Cathy H. Lewis, Regional Director, Region VIII, Office for Civil Rights, U.S. Department of Education, to Raul Bejarano, Superintendent, Nogales Unified School District #1, Nogales, AZ, re: Case No. 08935002, May 25, 1993; Paula Kuebler, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Joseph Kreskey Superintendent, Edison Township Public School District, Edison, NJ, re: Case No. 02–91–5001, July 7, 1992.

49 20 U.S.C. § 7402(c) (1994).

50 20 U.S.C. § 7422(b)(2)(B)(ii) (1994); 20 U.S.C. § 7423(b)(2)(B)(ii) (1994); 20 U.S.C. § 7424(b)(3)(B) (1994); and 20 U.S.C. § 7425(b)(4)(F) (1994).

Comprehensive School Grants;[53] and Systemwide Improvement Grants.[54] For all of these grant programs,[55] funds can be used for (but are not restricted to) improving instruction to students with limited English proficiency by identifying, acquiring, and upgrading curriculum, instructional materials, and educational software and assessment procedures.[56] Funds also can be used for applying educational technology.[57]

Compliance standards set forth by the Department of Justice's Civil Rights Division and OCR also stress the importance of evaluating facilities and other resources before the start of and during the implementation of educational programs for students with limited English proficiency. OCR and the Civil Rights Division employ the legal standard contained in the three-prong test in the *Castaneda* case in advancing their responsibilities under Title VI and the Equal Educational Opportunities Act, respectively. Based on *Castaneda*, compliance with the statutory provisions means "proper implementation" and a likelihood of program effectiveness. "Proper implementation" requires the equitable (or comparable) allocation of resources among educational programs for (national origin minority) students with limited or no English proficiency and the school district's regular education program.

Evaluating and allocating facilities before the start of and during the implementation of educational programs has been recognized as an important means of ensuring equal educational opportunity for all students by a variety of authorities, including scholarly research on the allocation of facilities and resources such as books, computers, and study materials, and other resources among educational programs. For example, among the recommendations of a Stanford University scholar was ensuring that "instruction, materials, and opportunities for parental participation are adapted to the unique needs of LEP students."[58] Also, in accord with the emphasis on evaluation and allocation of facilities before the start of and during the implementation of educational programs, one legal scholar has described several definitions of equal educational opportunity including "equal access to schooling resources (equal dollars or equal facilities and services)."[59]

Research has supported the use of technology in promoting equal educational access for students with limited English proficiency. Various

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51 20 U.S.C. § 7422 (1994).

52 20 U.S.C. § 7423 (1994).

53 20 U.S.C. § 7424 (1994).

54 20 U.S.C. § 7425 (1994).

55 *See* U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination in Public Elementary and Secondary Education: Federal Law Enforcement* for a description of these four grant programs, including their funding levels. FY 1996 was the first year these programs were authorized to disseminate funds to grantees. Program Development and Implementation Grants and Program Enhancement Grants are for local education agencies. Because these programs are relatively new, examples are not yet available on how funds are used to address the needs of students with limited English proficiency (in reading, writing, speaking, and understanding English). *See* Executive Office of the President, Office of Management and Budget and U.S. General Services Administration, *Update to the 1995 Catalog of Federal Domestic Assistance* (Washington, D.C.: Government Printing Office, December 1995), pp. 969–70.

56 20 U.S.C. § 7422(b)(2)(B)(ii) (1994); 20 U.S.C. § 7423(b)(2)(B)(ii) (1994); 20 U.S.C. § 7424(b)(3)(B) (1994); and 20 U.S.C. § 7425(b)(4)(F) (1994).

57 20 U.S.C. § 7422(b)(2)(B)(ii) (1994); 20 U.S.C. § 7423(b)(2)(B)(ii) (1994); 20 U.S.C. § 7424(b)(3)(B) (1994); and 20 U.S.C. § 7425(b)(4)(F) (1994).

58 "Testimony of Kenji Hakuta on Behalf of The Stanford Working Group on Federal Education Programs for Limited-English-Proficient Students," Before the House Subcommittee on Elementary, Secondary and Vocational Education, July 22, 1993, pp. 73, 78.

59 Yudof, *Equal Educational Opportunities and Courts*, 51 Tex. L.R. 411, 412 (1973).

devices and instructional materials are available for students to learn using technological devices.[60] These include books, study materials, computers, and other technological devices. These devices and equipment can contribute to the provision of an enriched linguistic environment that makes regular use of bilingualism for academic purposes.[61] Technology, for instance, can have a significant positive effect on students with limited English proficiency and can be considered as an essential resource for meaningful, active, and relevant instruction to students with limited English proficiency.[62] Various instructional and educational resources can foster the transformation of cognitive skills, conceptual knowledge, and experiences from a native language into English.[63]

Various educators have reported that for limited English proficient students with reading difficulties, technological devices can demystify the decoding process and encourage them to use alternate reading strategies.[64] Software programs on basic scientific concepts can be effective resources to provide the background knowledge, grammar, and vocabulary useful for developing literacy skills, and comprehending the English language and its concepts overall.[65] Ultimately, educational resources such as technology can assist non-English speaking students in improving language acquisition, to keep pace with their English speaking peers in academic subjects.[66] According to an elementary school educator in California, technological resources, in particular, enable non-English speaking students to participate immediately in classroom activities and learning in general, regardless of their language or technology-proficiency.[67] Students with limited English proficiency who have utilized computers for one academic year can show progress in English writing skills, speak more clearly, pass more subject matter examinations, and improve their efficiency in their school work.[68]

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60 Angela Mielke and Checho Flores, "Bilingual Technology Equalizes Opportunity in Elementary Classrooms," in Lillian Malave and Jo Ann Parla, eds., *National Association for Bilingual Education Conference Proceedings 1992–1993* (Washington, D.C.: National Association of Bilingual Education, 1993), p. 85. Mielke and Checho Flores use the term "dominant modality" to refer to the language in which the student learns most efficiently. They state that:
"The bilingual student benefits from computer assisted learning because of the extra time, patience, interactivity, and feedback provided by this technology leading to more expedient and efficient learning. The motivational factor for the child in using computers is also very high. Multimedia software takes advantage of sound and graphic capabilities of computers, allowing the child to be exposed to learning in a variety of modalities. Learning style theories emphasize the importance of allowing the child to learn in his/her dominant modality." Ibid. (hereafter cited as Mielke and Flores, "Bilingual Technology Equalizes Opportunity").
According to a view endorsed by the education association Phi Delta Kappa, resources such as technology expand instructional modes and learning activities that better match students' preferred learning styles. *See* L. Thomas and D. Knezek, "Providing Technology Leadership for Restructured Schools," *Journal of Research on Computing in Education* (Winter 1991), p. 269.

61 Mielke and Flores, "Bilingual Technology Equalizes Opportunity," p. 85.

62 Mielke and Flores, "Bilingual Technology Equalizes Opportunity."

63 Mielke and Flores, "Bilingual Technology Equalizes Opportunity," p. 84.

64 U.S. Department of Education, Office of Educational Technology, *Making it Happen: A Report of the Secretary's Conference on Educational Technology*, Issue 1 (March 1995), p. 4.

65 Mielke and Flores, "Bilingual Technology Equalizes Opportunity," p. 86.

66 U.S Department of Education, Office of Educational Technology, *Making it Happen: A Report of the Secretary's Conference on Educational Technology*, Issue 1 (March 1995), p. 4.

67 Isabelle Bruder et al., "School Reform: Why You Need Technology to Get There," *Electronic Learning* (May/June 1992), p. 26.

68 Bruder et al., "School Reform," p. 26.

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School Districts' Obligations to Provide Resources and Facilities to Address Educational Needs of Students with Limited English Proficiency

The Federal Government does not prescribe specific resources or facilities school districts must provide, ranging from basic facilities to high-tech devices and equipment, for students with limited English proficiency, even though the Nation's school systems must take appropriate action,[69] ensure meaningful access,[70] and provide effective participation for children from non-English backgrounds.[71] Moreover, no Federal statute requires local school districts to assess the availability of specific resources such as computer hardware and software accessible to students with limited English proficiency. No Federal policy mandates that school districts include any type or amount of technological resources into the educational program provided to students with limited English proficiency. No Federal law directs local education agencies to evaluate how well educational technology or particular types of instructional materials have been incorporated into their alternative language instruction programs for students with limited English proficiency.

Barriers associated with the evaluation and allocation of resources facilities prevent schools from achieving the goal of equal educational opportunity and equal access for all students. For schools and school districts where resources such as teachers or other facilities are in short supply, the issue of compliance with civil rights law and policy and the provision of equal educational opportunity becomes a much greater challenge. For students with limited English proficiency who are often in educational programs separate from the school's regular educational program, these barriers include poor access to and quality of physical facilities such as classrooms, textbooks, other instructional materials, electronic and on-line services.

Evaluating and allocating facilities and other resources prior to the development and during the implementation of educational programs in the context of students with limited English proficiency means providing such students with equal access to quality facilities and textbooks, instructional materials, and access to other learning tools such as computers and on-line services for such students. Access to materials includes both availability of the materials and the degree to which the materials ensure that the educational needs of such students are being met. This requires that educational programs for such students provide access to facilities and materials that are tailored to meet the specific educational needs of such students. For example, the way in which textbooks and other instructional materials are used is extremely important in inclusion for students with limited English proficiency and in the provision of equal access.[72] Schools may, depending on the kind of educational program they are providing to students with limited English proficiency, need to use instructional materi-

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69 Pub. L. 93–380, Sec. 1703(f), 88 Stat. 515 (codified as amended in 20 U.S.C. §§ 1701–1714).

70 414 U.S. 563 (1974).

71 *Id.* at 566.

72 Donna M. Gollnick and Philip C. Chinn, *Multicultural Education for Exceptional Children*, (Reston, VA: The Council on Handicapped and Exceptional Children, Clearinghouse on Handicapped and Exceptional Children, ERIC Digest, May 1991), p. 1.; *see also*, Judith A. Marquez and Cheryl B. Sawyer, "Curriculum Extension for the Gifted and Talented Students with Limited English Proficiency," *National Association for Bilingual Education Annual Conference Journal*, pp. 21–30 (Washington, D.C.: National Association for Bilingual Education, 1993) (noting that interdisciplinary approaches should be included in a flexible curriculum which incorporates broad-based themes. The study, knowledge, and awareness of outstanding individuals in the arts, sciences, humanities, among other field from culturally diverse groups should be considered as a component of the curriculum rather than as a separate unit. For example, George Washington Carver should be included within the context of the agricultural revolution and Cesar Chavez within the study of unions, the mathematical contributions of the Mayans within the study of math, and so forth. Ibid., p. 25).

als written in the students' native language. Moreover, textbooks and instructional materials reflect society's perspectives on such classifications as race, gender, national origin, and disability.[73] Where bias or discriminatory viewpoints are contained within a textbook or other instructional material, the students will be adversely affected.[74] Therefore, it is crucial that schools and teachers, in particular, recognize subtle as well as blatant forms of bias that act as barriers to both inclusion and equal access.[75]

The barriers experienced by students with limited English proficiency range from the basic, such as access to school facilities, to the more sophisticated, such as equal access to new, "high technology" materials and equipment. Court cases illustrate the barriers to equal educational opportunities for students with limited English proficiency that have ensued where State and local educational agencies have failed to evaluate and allocate resources equitably among students who are white and students who are members of national origin minority groups.

One example is the case of *Sinajini v. Board of Education*,[76] a lengthy desegregation litigation that began in the 1970s. In *Sinajini*, the plaintiffs alleged violations of the equal protection clause of the 14th amendment.[77] Specifically, the plaintiffs in this case alleged that the school district violated the 14th amendment's equal protection clause by denying equal educational opportunity to limited English proficient Native American students whose predominant spoken home language was Navajo.[78] The plaintiffs' claims rested

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73 Ibid.

74 Ibid.

75 Ibid. (citing D.M. Gollnick and P.C. Chinn, *Multicultural Education in a Pluralistic Society* (St. Louis, MO: Mosby, 1990)). Such forms of bias present in textbooks and instructional materials include the following: invisibility, stereotyping, selectivity and imbalance, unreality, fragmentation and isolation, and language. Ibid. (citing M. Sadker and D. Sadker, "The Teacher Educator's Role" in *Implementing Title IX and Attaining Sex Equality: A Workshop Package for Postsecondary Educators* (Washington, D.C.: Council of Chief State Schools, 1978)).
Invisibility "means that certain microculture, including disability groups, are underrepresented in materials. This omission implies that these groups have less value, importance, and significance in our society." *Stereotyping* "assigns traditional and rigid roles or attributes to a group. Stereotyping occurs across cultural and exceptionality groups." *Selectivity and imbalance* "occur when issues and situations are interpreted from only one perspective, usually the perspective of the majority group. With such an emphasis, minority persons and individuals with disabilities often do not learn about the contributions of members of their cultural groups to the development of our society. Such biases prevent all students from realizing the complexity of historical and contemporary situations and developments." *Unreality* "is most likely to present itself in the portrayal of history and contemporary life experiences. Controversial topics are glossed over, and discussions of discrimination and prejudice are avoided. This unrealistic coverage denies children the information needed to recognize, understand, and perhaps conquer the problems that plague our society. Contemporary problems faced by individuals with disabilities and those from diverse racial and ethnic groups are often disguised or simply not included." *Fragmentation and isolation* "occur when publishers discuss issues, contributions, and information about various groups in a separate section or chapter apart from the regular text. This add-on approach suggests that the experiences and contributions of these groups are merely an interesting diversion, not an integral part of historical and contemporary developments." Ibid.

76 *See* Sinajini v. Board of Educ., LEXIS GENFED Library, DIST File, No. C-74-346 (C.D. Utah Oct. 31, 1975).

77 Sinajini v. Board of Educ., LEXIS GENFED Library, DIST File, No. C-74-346, P 2 (C.D. Utah Oct. 31, 1975).

78 Sinajini v. Board of Educ., LEXIS GENFED Library, DIST File, No. C-74-346, P 2, 16 (C.D. Utah Oct. 31, 1975). The plaintiffs in *Sinajini* alleged the defendant's failure to adopt and implement an appropriate alternative language program for students with limited English proficiency, specifically the failure to provide Native American students attending schools where the enrollment is predominantly Native American facilities equal to those provided to students who attend predominantly white schools. The parties to that case entered into a consent decree requiring the district to construct secondary facilities in the Oljato-Monument Valley-Mexican Hat area and in the Montezuma Creek-Aneth-Red Mesa area and to "use its best efforts to provide an education program . . . at each of the new schools which is of substantially as high quality as the existing secondary programs in the District." Sinajini v. Board of Educ., LEXIS GENFED Library, DIST File, No. C-74-346, at P 17. *See also* Meyers v. Bd. of Educ. v. San Juan Sch. Dist., 905 F. Supp. 1544 (C.D. Utah 1995).

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in part on the failure of the school district to provide equitable resources for these students. These resources included facilities, educational materials, and staffing resources including teachers and teachers aides.

In *Sinajini*, a Federal district court in Utah presided over a consent decree based on a settlement agreement between the parties that required the school district to provide equitable resources for the Native American students. Specifically, the court required the school district to submit a plan that would state

> (a) the renovation, expansion and improvement to existing elementary facilities; (b) the schedule for all such work; (c) the anticipated completion for all such work; and (d) the means by which substantial equality will be achieved in quantity and quality of library resources, equipment, textbooks and supplies.[79]

Another example is the case of *People Who Care v. Rockford Board of Education*.[80] The court found specifically with respect to students enrolled in the Rockford district's bilingual program that the district offered "qualitatively different" transportation to students in its bilingual program than to students enrolled in its regular education program, thus depriving the bilingual students of equal access to school facilities.[81] The court explained:

> [t]he RSD transportation for bilingual students was qualitatively different from the transportation provided for white desegregation students. White student participation in desegregation was voluntary in the RSD. The RSD transportation policy with regard to the voluntary alternative/focus programs (predominantly white) was to provide a yellow school bus to students who lived more than 1.5 miles from school, regardless to their proximity to a Rockford Mass Transit District (hereinafter "RMTD") bus stop. . . . The bilingual students were provided with Board-paid transportation. Unlike alternative and focus program students, however, the transportation for bilingual students was, in most cases, through the RMTD and not by yellow school buses. This was so, even though, for reporting purposes, the RSD called bilingual students "focus program" participants. . . . Transportation Department documents showed that majority open enrollment, focus and alternative students qualified for Board-paid transportation both if they lived less than 1.5 miles from an RSD stop and if they lived more than 1.5 miles form an RMTD stop. Accordingly, these white desegregation students qualified for Board-paid transportation under all circumstances. In contrast, when transportation was provided to bilingual students, it was always "mass transit only." No similar notation appeared next to any majority alternative, open enrollment or focus transfers. . . . Even for those few bilingual students who rode yellow school buses, the burden of crosstown busing was substantial.[82]

The *People Who Care* case provides other examples of deficiencies in access to instructional materials for students in its bilingual program. The district court's findings of fact in the case also note that the RSD failed to provide students in its bilingual program with such basic amenities as sufficient space to conduct classes and with adequate access to important instructional materials such as textbooks.[83] The court stated:

> "[s]pecifically with regard to the Bilingual Program, the RSD's failure to provide sufficient space has resulted in overcrowding of bilingual students and the holding of bilingual classes in inappropriate areas. . . . At Nashold [a school in the Rockford School District], two bilingual classes at one time were held in the same room. Approximately fifteen to twenty students were

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79 Agreement of Parties, Sinajini v. Board of Educ., LEXIS GENFED Library, DIST File, No. C–74–346, at P 36.

80 851 F. Supp. 905 (N.D. Ill. 1994), *subsequent appeal*, 68 F.3d 172 (7th Cir. 1995), *summ. judgment denied*, 1996 U.S. Dist. LEXIS 9530 (N.D. Ill. Jan. 26, 1996), *remanded*, 90 F.3d 1307 (7th Cir. 1996), *and aff'd in part, rev'd in part, remanded*, 1997 U.S. App. LEXIS 7143 (7th Cir. Apr. 15, 1997). In its 1997 opinion, the seventh circuit did not reverse the lower court's remedial order with respect to any issues relating to the school's bilingual education programs.

81 *Id.* at 1187.

82 *Id.*

83 *Id.* at 1188–90.

on each side of the room. Children would turn around and listen to the other teacher. Noise and instruction from each class interfered with the other. Also at Nashold, the bilingual classes were moved into the gym. The bilingual students were put 'on the stage while gym classes were going on' or the students 'would stand in the aisle . . . waiting for the gym to empty in order to go' back to class. Sometimes the class was held in the hallway."[84]

The court noted further that a bilingual teacher at another school in Rockford testified that during each of her 4 years at that school, she ordered bilingual algebra books.[85] She never received the books and students had to share books. The teacher filed a grievance but the school subsequently dropped this algebra class and the grievance was therefore never handled.[86]

The *People Who Care* case illustrates problems confronted by students with limited English proficiency in gaining equal access to basic facilities and resources. However, as we become an increasingly "high-technology" society, newer forms of instructional materials are available to students. These include computer hardware and software, CD–ROMs, and videodisc players. Mainly because of the high cost for schools in providing these "high-tech" instructional materials, access to them remains limited. Nonetheless, it is clear that these materials have vast potential as learning tools in the future. Therefore, an access issue arises in ensuring that such materials and facilities, particularly computer capability, are available to all students.

In summary, facilities or instructional materials that fail to provide adequate written native language instruction and/or reflect cultural bias deny equal access to students limited with limited English proficiency by limiting the effectiveness with which such students can participate. Seen in this light, the failure by a school to address the issue closely resembles the circumstances of the San Francisco students in the *Lau* case. There, the U.S. Supreme Court noted that failure to provide instruction in a language comprehensible to all students denied them meaningful access to the school's regular education program. Where schools operate programs using facilities and materials that reflect bias against students with limited English proficiency, a denial of meaningful access and effective participation is occurring.

Evaluating and Allocating Facilities and Resources

Although school districts are not limited by the Federal Government with respect to their strategies to address the English deficits of students with limited English proficiency, school districts are obligated to follow Federal guidelines.[87] Current Federal education program funding and civil rights policies provide support for equitable allocations of facilities and resources across education programs.[88] To meet these standards, schools must adequately evaluate and allocate facilities before the start of educational programs.

In implementing the Title VI statute, OCR's Title VI regulations address specific compliance related issues and civil rights theories relied on by OCR in making determinations for compliance. For example, in the context of evaluating and allocating facilities and resources, the Title VI regulations provide language implementing the Title VI statute's requirements for nondiscrimination. The Title VI regulations specifically prohibit denial of, restriction, or differential treatment on the basis of race, color, or national origin in the provision of any service, benefit, or facility

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84 *Id.*

85 *Id.* at 1190.

86 *Id.*

87 Evaluating and allocating facilities and other resources before the start of and during the implementation of educational programs derives its importance from the recognition of entitlement to equal access supported in policy set forth in the Bilingual Education Act; U.S. Department of Education and U.S. Department of Justice civil rights compliance guidelines and activities; and in legal/educational scholarship on equal educational opportunity, which are described below.

88 *See e.g.*, 20 U.S.C. § 7402 (1994); 20 U.S.C. § 1703(f) (1994); 34 C.F.R. § 100.3 (1996); 35 Fed. Reg. 11,595 (1970).

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provided by a recipient of Federal funds.[89] Although the Title VI regulations require equitable allocations of resources generally, they do not specifically refer to allocations of particular kinds of facilities and resources such as instructional methodologies and programs, and instructional materials including textbooks and high-tech teaching tools such as computers and the Internet. However, the broad prescription against "differential treatment" cited above provides the guiding principle on which OCR bases its civil rights implementation, compliance, and enforcement activity addressing evaluation and allocation of facilities and resources to ensure equal educational opportunity for students with limited English proficiency.

OCR's September 1991 memorandum also does not make specific reference to facilities and resources such as instructional methodologies and programs, and instructional materials such as textbooks and computers. However, OCR does include instructional materials among the program aspects it evaluates in conducting *Lau* compliance reviews, complaint investigations, and technical assistance activities.[90] In *Lau* itself, the U.S. Supreme Court specifically referred to the necessity for equality of treatment with respect to the provision of instructional materials and facilities. The Court noted that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[91]

In addition, OCR's December 1985 policy memorandum indicates that in order for school districts to ensure that alternative language program services are delivered effectively, districts are expected to provide adequate resources, such as instructional materials and equipment, in accordance with the requirements of the program.[92] The adequacy of resources is determined by the timely availability of required equipment and instructional materials.[93] Limited financial resources do not justify failure to remedy a deficient supply of instructional materials and resources suitable for LEP students.[94]

However, OCR's policy guidance does not discuss more recent case law addressing Title VI/*Lau* compliance issues relating to equitable allocations of facilities and resources for students with limited English proficiency. Federal courts in the 1990s have, however, specifically addressed equitable access to instructional programs and materials, such as textbooks and other instructional materials, in educational programs for students with limited English proficiency.[95]

In *People Who Care*, the court examined whether the school district's actions violated Title VI by discriminating against students with limited English proficiency. As part of its discrimination analysis, the court assessed whether or not students in the bilingual program were receiving educational services equal to students in the regular education program. Under OCR's Title VI regulations, a recipient of Federal funding may not "provide any service, financial aid, or other benefit to an individual which is different, or is

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89 *See generally* 34 C.F.R. § 100.3(a)–(b) (1996).

90 Martinez interview, p. 1 (stating in reference to *Lau* compliance reviews and complaint investigations that "[w]e look at the program model itself, how that model is being implemented, the identification of students for the program, materials used in the program, staffing, exit criteria, parental notice, facilities, and access to special programs.").

91 414 U.S. 563, 566 (1974).

92 *See* U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," Dec. 3, 1985.

93 Ibid.

94 Ibid.

95 *See e.g.*, 851 F. Supp. 905; Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141 (6th Cir. 1992); Coalition to Save our Children v. Buchanan, 744 F. Supp. 582 (D. Del. 1990).

provided in a different manner, from that provided to others under the same program."[96] Relying on this analysis, the court found that "[t]he educational services received by Bilingual Program students were not equal to those received by students in the regular instructional program."[97]

Although OCR does not discuss recent case law addressing the evaluation and allocation of facilities and resources in its policy guidance, in this context, as in others, OCR relies on the *Castaneda* case's standard in fashioning its compliance standards and analysis. The 1991 policy update shows that OCR's compliance analysis relating to the evaluation and allocation of facilities and resources derives from the second of the three prongs of the *Castaneda* standard. This prong requires that in evaluating a school's educational program for students with limited English proficiency that OCR examine the implementation of the program to determine whether the school is properly implementing its educational approach or method with appropriate practices.

OCR's Title VI/*Lau* compliance program also includes technical assistance and outreach and education activities. In conducting technical assistance and outreach and education activities with States and local school districts, OCR seeks to ensure that there is equal treatment and appropriate practice in the evaluation and allocation of resources and facilities including instructional materials. OCR addresses the importance of promoting equal access to these kinds of facilities and materials in its technical assistance and outreach and education materials. For example, in one OCR-developed document containing the results of an OCR survey in which 21 States and the District of Columbia responded to an OCR request for information regarding State policy toward the instruction of students with limited English proficiency, OCR provided information from the various States on how they fund services for this instruction. The State of Louisiana, for example, reported that it relied on Title I and Title II funds as well as State funds for the purchase of textbooks, library books, and school supplies. The State reported that it provides each district with $2,317.00 for each student with limited English proficiency.[98] In addition, Louisiana reported that "[s]tudents who qualify for 'free or reduced lunch' have a 15 percent weight added to the district allotment."[99] Louisiana also reported that it provides districts block grants that may be used to fund LEP services.[100] The State awards the grants on a competitive basis.[101]

A review of OCR's case letters based on complaint investigations and compliance reviews reveals that the educational practices OCR evaluates include the use and distribution of resources, facilities, and instructional materials including textbooks. OCR's Title VI/*Lau* enforcement activities such as compliance reviews and complaint investigations have included evaluations of specific instructional materials such as textbooks. A review of OCR's letters of findings during the past

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96 34 C.F.R. § 100.3(b) (1996).

97 851 F. Supp. at 1187.

98 *See* U.S. Department of Education, Office for Civil Rights, technical assistance document retrieved from OCR's electronic library (file name: HQ960205.tap) citing Louisiana Dept. of Education, *Louisiana School Administrators Handbook*, Bulletin 1851, p. 21 (1992).

99 *See* U.S. Department of Education, Office for Civil Rights, technical assistance document retrieved from OCR's electronic library (file name: HQ960205.tap) citing Louisiana Dept. of Education, *Louisiana School Administrators Handbook*, Bulletin 1851, p. 10 (1992).

100 *See* U.S. Department of Education, Office for Civil Rights, technical assistance document retrieved from OCR's electronic library (file name: HQ960205.tap) citing Louisiana Dept. of Education, *Louisiana School Administrators Handbook*, Bulletin 1851, p. 10 (1992).

101 *See* U.S. Department of Education, Office for Civil Rights, technical assistance document retrieved from OCR's electronic library (file name: HQ960205.tap) citing Louisiana Dept. of Education, *Louisiana School Administrators Handbook*, Bulletin 1851, p. 10 (1992).

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5-years reveals that OCR sometimes addresses the issue of equitable allocations of educational facilities and resources such as textbooks and other key instructional materials.[102] Because instructional materials such as textbooks and computers play such a crucial role in appropriate program implementation, regardless of what educational approach the school has chosen, OCR evaluates these facilities, resources, and materials using such criteria as comparability with the regular education program's facilities and resources; and appropriateness with respect to quality, condition, supply, and quantity of the instructional materials and resources used in programs to instruct students with limited English proficiency. Generally, it appears from a review of OCR case letters that OCR looks to these criteria in determining compliance with Title VI with respect to instructional materials such as textbooks.[103]

In a letter of findings to a school district in New Jersey, OCR's Region II evaluated the supply, condition, and quality of textbooks and other instructional materials provided students with limited English proficiency in a bilingual/ESL program in its compliance review.[104] OCR found:

> The Supervisor and the bilingual and ESL teachers select the textbooks for the Program. Some of the textbooks utilized are specifically designed for LEP students while others are the same ones used by non-LEP students. None of the individuals interviewed by OCR indicated that the textbooks and other materials provided were outdated or not age-appropriate. There is an adequate supply of textbooks for all LEP students. Additionally, some teachers supplement the textbooks with xeroxed material, tapes and other books. OCR inspected some of the textbooks used by LEP students and found the books to be in good condition; some of the books inspected were new. . . The same facilities and services are used by LEP and non-LEP students. *LEP students have access to the schools' full curricula*. Staff and parents interviewed indicated that LEP students participate in elective courses, school trips and extracurricular activities such as sports and band.[105]

OCR concluded:

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102 *See e.g.*, Charles Smailer, Division Director, Region III, Office for Civil Rights, U.S. Department of Education, to Thomas Doluisio, Superintendent, Bethlehem Area School District, Bethlehem, PA, re: 03931029, May 31, 1995; Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to James B. Clarke, Jr., Superintendent, Linden Public School District, Linden, NJ, re: Case No. 02–93–5002, Mar. 10, 1995; Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Robert Holster, Superintendent Passaic Public School District, Passaic, NJ, re: Case No. 02–94–5006, June 29, 1995; Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to Superintendent, Atlantic City School District, Atlantic City, NJ, re: Compliance Review No. 02–94–5008, Jan. 30, 1996; Gary D. Jackson, Regional Civil Rights Director, Region X, Office for Civil Rights, U.S. Department of Education, to Nat Lommori, Superintendent Lyon County School District, Yerington, NV, re: 10945005, July 17, 1995; John Palomino, Regional Civil Rights Director, Region IX, Office for Civil Rights, U.S. Department of Education, to John L. Rindone, Superintendent, Sweetwater Union High School District, Chula Vista, CA, re: 09–94–1193, Mar. 14, 1995; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Jim B. Hensley, Superintendent, Kansas City Unified School District, Kansas City, KS, re: 07925004, July 29, 1993; Archie B. Meyer, Regional Director, Region IV, Office for Civil Rights, U.S. Department of Education, to Garry W. Norris, Superintendent, Indian River County School District, Vero Beach, FL, re: 04–92–5002, July 24, 1992.

103 *See* Helen N. Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, Robert J. Roelle, Superintendent of Schools, Ossining Union Free School District, Ossining, NY, re: Case No. 02–94–5005, June 28, 1995, p. 4; Charles J. Nowell, Regional Director, Region VII, Office for Civil Rights, U.S. Department of Education, to Jim B. Hensley, Superintendent, Kansas City Unified School District, Kansas City, KS, re: 07925004, July 29, 1993, p. 18; M. Arnold Chavez, Branch Chief, Compliance Enforcement Division II, Region VIII, Office for Civil Rights, U.S. Department of Education, to Steven H. Peterson, Superintendent, St. George, UT, re: 089445022, Nov. 8, 1995, p. 12.

104 *See* Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to James B. Clarke, Jr., Superintendent, Linden Public School District, Linden, NJ, re: Case No. 02–93–5002, Mar. 10, 1995 [hereafter cited as LOF dated 3/10/95].

105 Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to James B. Clarke, Jr., Superintendent, Linden Public School District, Linden, NJ, re: Case No. 02–93–5002, Mar. 10, 1995, pp. 5–6 [emphasis added].

OCR has determined that the evidence is not sufficient to support a finding of a violation of Title VI with respect to the District's exiting criteria and procedures, qualifications of the instructional staff, instructional materials and the inclusion of LEP students with non-LEP students.[106]

The enforcement analysis in this letter of findings appears based on 1) a comparison between the educational services and materials provided to students with limited English proficiency in the bilingual program with those provided to English proficient students in the regular education program; and 2) an evaluation of the educational services and materials provided limited English proficient students to determine the appropriateness of the services provided limited English proficient students independent of the educational services and materials provided students in the regular education program. This analysis appears thorough in that it addresses a number of specific criteria such as whether the materials used by students in the bilingual program were in good condition, up-to-date, sufficiently supplied, and age appropriate.

Elsewhere, OCR has found compliance violations on the basis of either inadequate supply or poor condition of instructional materials such as textbooks. For example, OCR found a Utah school district in noncompliance where the school failed to provide an adequate supply of instructional materials to support the ESL program it was conducting.[107] OCR informed the school district that:

> OCR determined, based on data submitted by the District and interview statements, the District failed to provide adequate materials to fully support an ESL program, and an adequate number of grade and instruction appropriate materials were not available to students and instructors. Thus, the District failed to provide instructional materials, textbooks and other resources to its LEP students which were adequate to implement an effective A[lternate] L[anguage] P[rogram].[108]

Importantly, the compliance discussions in these letters of findings indicates that OCR investigative staff have performed a compliance analysis that comports with the requirements of the Title VI regulation relating to the provision of educational services and benefits. Specifically, the analysis in this letter of findings is consistent with the regulatory prescription at 100 C.F.R. § 100.3(b)(ii),[109] which requires the school district to ensure that there is no difference in the educational services provided or the way in which they are provided on the basis of race, color, or national origin. This analysis indicates a thorough evaluation of the school district's allocation of instructional materials to students with limited English proficiency.

OCR also has also entered into corrective action plans with school districts in *Lau* cases requiring corrective action that includes ensuring "equity in materials and facilities" in part through efforts to upgrade and ensure adequate supply of instructional materials such as textbooks.[110] For example, as part of a corrective action plan with a school district in Massachusetts, OCR required the school district to:

> conduct a review of school facilities District-wide and reallocate space as necessary to ensure equity in the assignment of space to programs. Reallocation was completed by the beginning of the 1993–94 school year,

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106 Helen Whitney, Regional Director, Region II, Office for Civil Rights, U.S. Department of Education, to James B. Clarke, Jr., Superintendent, Linden Public School District, Linden, NJ, re: Case No. 02–93–5002, Mar. 10, 1995, p. 6.

107 *See* M. Arnold Chavez, Branch Chief, Compliance Enforcement Division II, Region VIII, Office for Civil Rights, U.S. Department of Education, to Steven H. Peterson, Superintendent, St. George, UT, re: 089445022, Nov. 8, 1995, p. 12.

108 *See* M. Arnold Chavez, Branch Chief, Compliance Enforcement Division II, Region VIII, Office for Civil Rights, U.S. Department of Education, to Steven H. Peterson, Superintendent, St. George, UT, re: 089445022, Nov. 8, 1995, p. 12.

109 Stating that recipients of Federal funds may not "[p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program."

110 *See* Corrective Action Plan, Somerville Public Schools, Compliance Review No. 01–92–5002.

and the District will continue to review its facilities on an ongoing basis to ensure equity in allocation. . . On an ongoing basis, the District will ensure that comparable materials and supplies are provided to the TBE Program as it supplies to the standard educational program, including textbooks, library books and instructional materials and supplies.[111]

111 *See* Corrective Action Plan, Somerville Public Schools, Compliance Review No. 01-92-5002, p. 9.

Chapter 9

Undertaking Individualized and Institutional Efforts to Eliminate Barriers, Provide Equal Access, and Maximize Student Potential

Background

The elimination of barriers to equal educational opportunity, the promotion of equal access to education programs, and efforts to ensure that each student maximizes his or her potential form the basis of a learning environment in which all students can develop academically to their fullest potential. Within the school environment, efforts to promote positive social and self-perceptions require an emphasis on building each student's academic potential. The efforts of teachers, parents, and students themselves to eliminate barriers associated with limited English proficiency provide the means to address barriers to educational opportunities and equal access to the regular educational program through individual and interpersonal efforts. The basic prerequisites for achieving these goals, within the school and the classroom, include focusing on each student's individual educational needs and valuing them as important contributions to the group learning process.

Legislators, courts, and other educational policymakers also have sought to address barriers to equal educational opportunity for students with limited English proficiency through institutional means, such as the development of statutory, regulatory, and case law. Federal, State, and local laws and policies have pursued these goals in civil rights laws and educational program statutes that have focused on: 1) expanding access to educational programs, 2) emphasizing the special educational needs of students who have limited English proficiency in seeking to provide them with equal educational opportunities, and 3) requiring that schools focus on meeting more rigorous State academic standards for excellence in education for all children.

Eliminating All Barriers; Providing Equal Access to All Subjects, Activities, and Career Opportunities; and Ensuring that Each Student Maximizes His or Her Potential

The Individual Level: Interactions Within the School and the Classroom

Within the school and the classroom, the interactions between school personnel (including teachers, counselors, administrators, and staff) and students and their parents is a crucial aspect of the process of removing all barriers and encouraging each student to maximize his or her potential, and ultimately, providing students with equal educational opportunities. Interactions between teachers and counselors and their students are particularly important. Just as parents influence the development of their child's level of self-esteem and notions of self-worth in the home, each day in school it is teachers and counselors who play a vital role in how their students view themselves.

Teachers and Counselors

Teachers and counselors can provide significant assistance to students with limited English proficiency in removing barriers; helping them to gain equal access to all subjects, activities, and career opportunities; and helping them to maxi-

mize their potential. However, court cases and research studies demonstrate that, oftentimes, school staff such as teachers and counselors are not fully responsive to the educational needs of students with limited English proficiency.[1] For example, one Federal court recently found that an Illinois school district administered its bilingual education program in violation of the constitutional rights of Hispanic students to equal protection of the laws in part because: "[b]ilingual students were steered toward easier and less beneficial classes by English-only speaking counselors and were inadequately provided with educational services and curricula comparable to white students."[2]

The perceptions and expectations of school staff such as teachers and counselors play an important role in shaping the educational experiences of students.[3] Scholars and educational experts generally agree that high teacher expectations are part of an effective approach to meeting the individual educational needs of each student.[4] In addition, at least one study indicates that high expectations from teachers and other staff serve to enhance the academic performance of students with limited English proficiency.[5]

Many educators advocate the importance of adequate counseling services in meeting the individual educational needs of students with limited English proficiency. For example, a pilot study of services available to students with limited English proficiency indicated that "[s]everal respondents commented that counseling services were extremely important for LEP students."[6] One respondent stated "above all, LEP students need to work on self-esteem. Their lack of confidence is a problem, so I stress counseling on an individual basis."[7]

English Proficient Peers

Peer interaction can influence the socialization process of educational experiences of students with limited English proficiency.[8] This influence,

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1 *See generally* Beatrice A. Ward and William J. Tikunoff, *Implementation of Support Efforts: Promoting Effective Instruction of Linguistically and Culturally Diverse Student Populations* (Los Alamitos, CA: Southwest Regional Lab, 1994); Stanford Working Group, *Federal Education Programs for Limited-English-Proficient Students: A Blueprint for the Second Generation* (Stanford University, 1993); Keh-nan Li and David B. Patton, *Asian Remedial Plan. Compliance Report No. 9116* (Philadelphia School District, PA, 1991); Barbara Christina, "An In-Service Training Course Designed to Increase Teachers' Strategies for Working Effectively with Second Language Learners in the Elementary School Mainstream Classroom" (Ed.D. dissertation, Nova University, 1992).

2 *See* People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905, 1192 (N.D. Ill. 1994), *subsequent appeal*, 68 F.3d 172 (7th Cir. 1995), *summ. judgment denied*, 1996 U.S. Dist. LEXIS 9530 (N.D. Ill. Jan. 26, 1996), *remanded*, 90 F.3d 1307 (7th Cir. 1996), *and aff'd in part, rev'd in part, remanded*, 1997 U.S. App. LEXIS 7143 (7th Cir. Apr. 15, 1997).

3 *See* chap. 9, generally.

4 *See generally* Alicia Salinas Sosa, "20 Years After *Lau*: In Pursuit of Equity, Not Just a Language Response Program," *Intercultural Development Research Association Newsletter*, vol. 22, no. 1 (January 1995); John E. Steffens, "Will the LEP Train Reach Its Destination? Designing the IHE Teacher Training Program for Specific LEP Student Instructional Needs," in *Focus on Evaluation and Measurement*, vols. 1 and 2, Proceedings of the National Research Symposium on Limited English Proficient Student Issues (2nd, Washington, DC: September 4–6, 1991).

5 *See* Tamara Lucas et al., "Promoting the Success of Latino Language-Minority Students: An Exploratory Study of Six High Schools," *Harvard Educational Review*, vol. 60, no. 3 (August 1990), pp. 315–40.

6 New York City Board of Education, Brooklyn, NY, Office of Research, Evaluation, and Assessment, *A Pilot Study of Services to Students of Limited English Proficiency in New York City Public Schools. Revised* (Washington, DC: U.S. Department of Education, Office of Educational Research and Improvement, 1991), p. 96 (hereafter cited as New York City Board of Education, *A Pilot Study of Services to Students of Limited English Proficiency in New York City Public Schools.*).

7 Ibid.

8 *See generally* Diane August and Kenji Hakuta, eds., *Improving Schooling for Language-Minority Children: A Research Agenda* (Washington, DC: National Academy Press, 1997); *see also* Beatrice A. Ward, *Implementation of Support Efforts: Promoting Effective Instruction of Linguistically and Culturally Diverse Student Populations* (Washington, DC: U.S.

however, sometimes can be a negative one for students with limited English proficiency, because English proficient students may withhold peer acceptance from students with limited English proficiency.[9] There is evidence indicating negative reactions of English proficient peers toward students with limited English proficiency. For example, in a survey of Vietnamese students with limited English proficiency, 85 percent of the interviewees stated that they had often or sometimes faced negative and sometimes discriminatory attitudes and behaviors from other students.[10]

Two scholars, Diane August, of the National Research Council, and Kenji Hakuta, of Stanford University, attribute negative interactions between students with limited English proficiency and their English proficient peers to the formation of insular social groups in which students who are members of the "ingroup" experience and display feelings of animosity toward others who are perceived as members of the "outgroup."[11] August and Hakuta, among other scholars, also cite cooperative learning teams as a possible option to reduce racial/ethnic related tensions among students.[12] These teams are based on the "contact hypothesis" which postulates that contact with members from different groups heightens tolerance of the group.[13]

The Institutional Level: Federal Funding

The passage of educational program statutes and civil rights laws illustrates how legislators and other educational policymakers have sought to use the institution of law to ensure equal educational opportunities for students with limited English proficiency. For example, at the Federal level, efforts to ensure equality of access to educational opportunities have been embodied in civil rights laws such as Title VI of the Civil Rights Act of 1964 and section 1703(f) of the Equal Educational Opportunities Act, which contain prohibitions against discrimination. The antidiscrimination prohibition of Title VI contains the sanction of withdrawal of Federal funding and requires the U.S. Department of Education (DOEd) to attempt negotiation of agreements with school systems to comply with these provisions. The Federal courts also have sought to assist in ensuring equal educational opportunities in their rulings interpreting antidiscrimination prohibitions in Federal civil rights laws such as Title VI and the Equal Educational Opportunities Act.[14]

Federal educational program statutes providing Federal funding to State and local education agencies for students with limited English proficiency have included the Elementary and Secondary Education Act, which Congress reauthorized most recently in the Improving America's Schools Act of 1994. Since the original passage of the

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Department of Education, 1994); New York City Board of Education, *A Pilot Study of Services to Students of Limited English Proficiency in New York City Schools*; Carol Ascher, "Southeast Asian Adolescents: Identity and Adjustment," *ERIC Digest*, no. 51 (1989).

9 New York City Board of Education, *A Pilot Study of Services to Students of Limited English Proficiency in New York City Schools*, p. 38.

10 *See* Donna G. Davis and Janet L. McDaid, "Identifying Second-Language Students' Needs: A Survey of Vietnamese High School Students," *Urban Education*, vol. 27, no. 1 (April 1992), pp. 32–40.

11 *See* August and Hakuta, eds., *Improving Schooling for Language-Minority Children: A Research Agenda*, pp. 93.

12 *See* ibid., pp. 94ff; *see also* Beatrice A. Ward, *Implementation of Support Efforts: Promoting Effective Instruction of Linguistically and Culturally Diverse Student Populations* (U.S. Department of Education, Washington, D.C., 1994), p. 13.

13 *See* ibid.

14 *See* 851 F. Supp. 905; Keyes v. Denver Sch. Dist. No. 1, 576 F. Supp. 1503 (D. Colo. 1983), *aff'd in part, remanded*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991); Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981); Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57 (E.D.N.Y. 1978).

Elementary and Secondary Education Act in 1965, the Federal Government has provided supplementary funding to State and local education agencies to assist them in achieving equality of access to educational programs, in particular the programs under Title I of the act. Another example is Title VII of the Elementary and Secondary Education Act, the Bilingual Education Act.[15] The provisions in the act that provide Federal assistance through funding and program requirements are designed to ensure equal educational opportunity reflect one effort to ensure access.

The primary mechanisms through which Federal policies have sought to eliminate barriers and provide access to all subjects, activities, and career opportunities have been through (1) education programs funded under such statutes as Title I and Title VII and (2) DOEd's civil rights enforcement and related activities. Federal education policy has sought to achieve equal educational opportunities for students through Federal civil rights enforcement efforts principally conducted by DOEd's Office for Civil Rights (OCR) and the U.S. Department of Justice, Civil Rights Division.

Education programs designed to assist students with limited English proficiency are, as for all education programs, tied to available funding. Moreover, with money scarce everywhere across the Nation, school districts are scrambling to keep both special and regular educational programs afloat. There is controversy because of concerns among some school districts that funds for special education programs for students with disabilities and students with limited English proficiency are taking funds away from regular education programs.[16] The growing number of immigrant and other students with limited English proficiency has serious implications for the ability of school districts to provide services to such students.

According to Cecilia Muñoz of the National Council of La Raza, "[t]here's a political dimension to these issues and a reality. The assumption is students don't want to learn English. The real issue is the capacity of programs to provide language training."[17] Nationwide, the demand for programs such as English for Speakers of Other Languages (ESOL) greatly exceeds the available programs and classes sponsored by States, local school districts, community colleges, labor organizations, church groups, immigrants rights organizations, and volunteer groups.[18] In New York City alone, there is currently a waiting list of 50,000 people for ESOL programs.[19]

Title I

Federal funding provided under Title I of the Elementary and Secondary Education Act,[20] and Title VII (the Bilingual Education Act) has for three decades provided assistance to States and local school districts in developing and implementing programs to deliver educational services to students with limited English proficiency. The process of reshaping current policy to make Title I and Title VII more effective in providing

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15 The current act states as its purpose: "(c) PURPOSE.—The purpose of this part is to educate limited English proficient children and youth to meet the same rigorous standards for academic performance expected of all children and youth, including meeting challenging State content standards and challenging State student performance standards. . . ." 20 U.S.C. § 7402(c) (1994).

16 "Fairfax School Spending is Criticized," *Washington Post*, Mar. 17, 1996, pp. B1, B7. (Reporting on the controversy between Fairfax County taxpayers and school system officials over funding increases in special and ESL programs. Fairfax County has implemented heavy increases in education spending over the past 16 years. During this period, education spending has increased from $300 million to nearly $1 billion. Among some of the causes cited in the article for the high spending levels are first grade classroom teacher's full-time assistant to help instruct 15 children who are not native English speakers.)

17 *See* "Surviving English 101: Learning English," *USA Today*, Feb. 28, 1997, p. A11.

18 Ibid.

19 Ibid.

20 This statute was reauthorized in 1994 as the Improving America's Schools Act, Pub. L. No. 103–382, 108 Stat. 3518 (codified at 20 U.S.C. §§ 6301–8962 (1994)).

services to students with limited English proficiency has already begun with the Improving America's Schools Act of 1994. The IASA has sought to improve services by focusing on funding formulas.

The 1994 Reauthorization

Title I of the Improving America's Schools Act, the 1994 reauthorization of the Elementary and Secondary Education Act, provides several programs designed to help State and local education agencies meet the educational needs of students with limited English proficiency. Although Congress has enunciated Federal policy with respect to establishing equal educational opportunities students with limited English proficiency more clearly under Title VII, the Bilingual Education Act, Title I has long provided the majority of Federal funding for education programs designed to improve educational opportunities for these students.

However, until recently, students with limited English proficiency could only receive Title I services if their educational needs stemmed from educational deprivation and were not related solely to limited English proficiency.[21] As a result of the lifting of these restrictions with the 1994 reauthorization of Title I, its services are reaching more of these students.[22]

The 1994 reauthorization of the Elementary and Secondary Education Act, in the Improving America's Schools Act, contains provisions that strengthen access to both Title I and Title VII programs. For example, Title I has been reformulated to expand access to programs in the following ways: 1) stressing systemic educational improvement, rather than remedial services; 2) emphasizing high academic standards, schoolwide programming in schools with 50 percent or more of students below the poverty line, comprehensive child services through the coordination of resources available under different Federal programs, parental involvement, authentic assessment of student progress, and ongoing staff development; and 3) developing Title I programs and services that are educationally appropriate for students with limited English proficiency.[23] Congress also amended the Title I program so that children with limited English proficiency can be served better.[24] In addition, the 1994 act added provisions to Title I that require schools to inform all parents about their child's education and to promote parental involvement.[25] Finally, the act includes new provisions designed to ensure the accuracy and fairness of student and program assessments.[26]

Reporting mechanisms on assessment of students having limited English proficiency are severely lacking in most States. Few States track such important data as retention rates, dropout rates, and special education referrals.[27] As a re-

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21 *See* 20 U.S.C. § 2724(d)(1)(1988). *See also* U.S. General Accounting Office, *Limited English Proficiency: A Growing and Costly Educational Challenge Facing Many School Districts* (1994), pp. 14–15.

22 *See* 20 U.S.C. § 6301 *et seq.* (1994).

23 Xavier Becerra, "Beyond Ideology: Educating Language-Minority Children Through the ESEA," in John F. Jennings, ed., *National Issues in Education: Elementary and Secondary Education Act*, (Bloomington, IN: Phi Delta Kappa International, and Washington, DC: The Institute for Educational Leadership, 1995), p. 116 (writing on changes to Title I and Title VII in 1994 act intended to benefit students with limited English proficiency) (hereafter cited as Becerra, "Beyond Ideology").

24 The statute previously contained a provision that made children with limited English proficiency eligible for Title I services if they had needs stemming from educational deprivation and not related solely to their limited English proficiency. This served to exclude such students rather than encourage their participation. Ibid., p. 111.

25 Ibid., p. 112.

26 Ibid., p. 113.

27 Council of Chief State School Officers, *Recommendations on Improving Assessment*, p. 5 (Reporting that only 30 States collect figures on the number of students retained in grade while in language assistance programs; 16 States collect figures on students having limited English proficiency placed below grade level; 32 States collect information on numbers of such students who dropped out of school while in language assistance programs; fewer than 10 States have a mechanism for

sult, it is difficult for State and local education agencies to make judgments on how best to strengthen programs and about the effectiveness of instruction at the local level.

Title VII: The Bilingual Education Act

Like all education programs in the United States, programs designed to provide special language instruction to students with limited English proficiency come primarily from the State and local education agencies. Title VII provides about $200 million annually to school districts across the Nation.

The 1994 Reauthorization

The Bilingual Education Act has operated since its original enactment in 1968 as a competitive grant program that provides grantee schools districts with financial resources to assist in developing capacity-building programs for students with limited English proficiency.[28] The current Bilingual Education Act (Title VII of the Improving America's Schools Act)[29] includes several new provisions that 1) emphasize high academic standards and 2) seek to expand access to educational programs at the school district level. The definition of a "bilingual education program" exemplifies the need for programs that emphasize high academic standards.[30] Provisions in the act detailing various different aspects of program development and implementation also emphasize this need. These include provisions relating to application,[31] evaluation,[32] and academic excellence awards[33] and other special programs for schools seeking funds under the act.[34] In addition, the

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monitoring the academic status of such students once they are placed in English-only classes).

28 *See* chap. 7, p. 143.

29 The complete title of the current Bilingual Education Act is Title VII: Bilingual Education, Language Enhancement, and Language Acquisition Programs. The act also covers the foreign language program, which provides services for all students, regardless of English language proficiency.

30 The definition of a bilingual education program in the act is: "[t]he term 'bilingual education program' means an educational program for limited English proficiency students that—'(B) *enables limited English proficient students to achieve English proficiency and academic mastery of subject matter content and higher order skills, including critical thinking, so as to meet age-appropriate grade-promotion and graduation standards in concert with National Education Goals*; . . . " 20 U.S.C. § 7601(18)(B) (1994).

31 The provision detailing application requirements for systemwide improvement grants states that: "the assistance provided under the application will contribute toward building the capacity of the applicant to provide a program on a regular basis, similar to that proposed for assistance, which will be of *sufficient size, scope, and quality to promise significant improvement in the education of limited English proficiency*. . . . " 20 U.S.C. § 7426(b)(5) (1994) (emphasis added).

32 The provision in the act outlining requirements for program evaluations conducted by recipient school districts states: "[e]ach recipient of funds under this subpart shall provide the Secretary with an evaluation, in the form prescribed by the Secretary, of such recipient's program every two years. (c) Evaluation Components.—Evaluations shall include—(1) how students are achieving the State student performance standards, if any, including data comparing children and youth of limited English proficiency with nonlimited English proficient children and youth with regard to school retention, academic achievement, and gains in English (and, where applicable, native language) proficiency; (2) program implementation indicators that provide information for informing and improving program management and effectiveness, including data on appropriateness of curriculum in relationship to grade and course requirements, appropriateness of program management, appropriateness of the staff's professional development, and appropriateness of the language of instruction; . . . " 20 U.S.C. § 7433(a), (c)(1)–(3) (1994).

33 The provision in the act describing academic excellence awards states: "[t]he Secretary may make grants to . . . State and local educational agencies . . . to promote the adoption and implementation of bilingual education, special alternative instruction programs, and professional development programs *that demonstrate promise of assisting children and youth of limited English proficiency to meet challenging State standards*." 20 U.S.C. § 7453(a) (1994) (emphasis added).

34 The findings in part B, foreign language assistance program, state: "The Congress finds as follows: "(1) Foreign language proficiency is crucial to our Nation's economic competitiveness and national security. Significant improvement in the quality and quantity of foreign language instruction offered in our Nation's elementary and secondary schools is necessary. . .

new act provides for "program development and implementation grants" and "systemwide improvement grants."[35]

The 1994 amendments to Title VII also sought to make policy more responsive to the needs of students with limited English proficiency. These changes included: 1) an expansion of local grants to encompass schoolwide and districtwide efforts; 2) an emphasis on bilingualism *as an outcome* of Title VII, a very important change that established a funding priority for "applications which provide for the development of bilingual proficiency for all participating students"; and 3) an emphasis on staff development, family education, and intensification of instruction by expanding the education calendar, encouraging the use of new technology, expanding the use of professional and volunteer aides, and providing supplementary programs and services when school is not in session.[36]

Appropriations for Title VII

DOEd requested $300 million for bilingual and immigrant education programs for fiscal year 1996.[37] This request exceeded the fiscal year 1995 budget appropriation allocated to DOEd for implementing these programs by $54.8 million or more than 22 percent. In requesting a budget of $300 million for fiscal year 1996, DOEd noted that:

> [t]hese programs assist local school districts in building their capacity to operate high-quality instructional programs for recently arrived immigrants and other limited English proficient (LEP) students. Census data indicate that the national population of school-aged LEP children grew 27 percent during the 1980s. Other studies have found as much as a 70 percent increase. Based on any data source, it is clear that the number of LEP children has grown substantially, and that the needs of school districts for programs to serve those children, and trained staff to work in those programs, has grown accordingly.[38]

Despite DOEd's budget requests, Congress decreased funding for both Title I and Title VII in its budget for fiscal year 1996. Title VII funding took a particularly large cut. Congress reduced funding for Title VII by $33 million, from $211 million in fiscal year 1995 to $178 million in fiscal year 1996. This funding reduction came at a time when statistics point to ever-increasing numbers of students whose level of English proficiency is such that they cannot participate effectively in their school's regular education program without some form of special assistance in acquiring English.

In fiscal year 1997, Congress appropriated a total of $261.7 million to the Office for Bilingual Education and Minority Language Affairs, which administers the Bilingual Education Act.[39] Congress appropriated $156.7 million for instruc-

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(3) *Proficiency in two or more languages should be promoted for all American students.* Multilingualism enhances cognitive and social growth . . . (8) *Children who have studied a foreign language in elementary school achieve expected gains and score higher on standardized tests of reading, language arts, and mathematics* than children who have not studied a foreign language." 20 U.S.C. § 7512(1),(3),(8) (1994) (emphasis added).

35 The purpose of program development grants is: "to *develop and implement new comprehensive, coherent, and successful* bilingual education or special alternative instructional programs limited English proficient students, including programs of early childhood education, kindergarten through twelfth grade education, *gifted and talented education*, and vocational and applied technology education." 20 U.S.C. § 7422(a) (1994) (emphasis added).
The purpose of systemwide improvement grants is: "to implement districtwide bilingual education programs or special alternative instruction programs to *improve, reform, and upgrade relevant programs and operations*, within an entire local educational agency, that serve a significant number of children and youth of limited English proficiency in local educational agencies with significant concentrations of such children and youth." 20 U.S.C. § 7425(a) (1994) (emphasis added).

36 Beccera, "Beyond Ideology," p. 116.

37 U.S. Department of Education, *The Fiscal Year 1996 Budget: Summary and Background Information* (Washington, DC: U.S. Department of Education, 1995), p. 32. This request included $155.7 million for instructional services, $15.3 million for support services, $29 million for professional development, and $100 million for immigrant education.

38 Ibid.

39 *See* "U.S. Department of Education Fiscal Year 1997 Congressional Action," p. 6.

tional services under the Bilingual Education Act, $5 million for foreign language assistance programs, and $100 million for the immigrant education services.[40] However, Congress provided no funding for support services or professional development programs under the Bilingual Education Act.[41] Support services include grants to State educational agencies to provide technical assistance to local educational agencies, the National Clearinghouse for Bilingual Education, and Academic Excellence Programs, among others. Professional development programs fund grants for universities and colleges to institute programs to train teachers of students with limited English proficiency and to provide scholarships and fellowships to college students or school teachers seeking to educate students with limited English proficiency. All of these play critical roles in improving the quality of education programs for students with limited English proficiency nationwide.

In general, funding for Federal programs targeted to students with limited English proficiency has not kept pace with the increasing numbers of these students.[42] For example, according to a report of the U.S. General Accounting Office, when inflation is considered, the $192 million appropriated for Title VII programs in 1990 is 40 percent less than the 1980 appropriation, though U.S. Census Bureau data show that the number of students with limited English proficiency has increased by more than 25 percent in those years.[43]

State and local education agencies access funding under the Bilingual Education Act through competitive grants. Because Title VII provides funds only to those school districts that participate in a competitive application process and receive high ratings, many smaller school districts have not been able to compete successfully for these funds.[44] Although Congress made substantial changes to Title VII in its 1994 reauthorization, funding through the act remains based on competitive grants. The competitive grants structure of the program, together with the limited funding appropriated by Congress in recent years, seem inconsistent with the growing need for educational services to assist in teaching English to students whose language barriers may be preventing them from effective participation in the all-English environment of schools' regular education programs.

Special Alternative Instructional Programs

Title VII funds both bilingual and "special alternative instruction programs." The statute requires that 75 percent of funds go to bilingual education programs. DOEd may award up to 25 percent of the act's funds to States and local school district grantees for special alternative instruction programs.[45] According to the definitions

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40 *See* ibid.

41 *See* ibid.

42 *See* U.S. General Accounting Office, *Limited English Proficiency: A Growing and Costly Educational Challenge Facing Many School Districts* (1994), p. 13.

43 *See* ibid.

44 *See* Statement of Marcia Kile, Program Consultant, ESL Services, Hearing Before the Committee on Education and Labor House of Representatives, Subcommittee on Elementary, Secondary, and Vocational Education, Washington, DC, July 22, 1993, pp. 81–82 (Stating that: "Since the passage of the Immigration Act of 1988, we have seen a dramatic increase in the numbers of LEP students arriving in south-central Pennsylvania. While the Pennsylvania Department of Education Chapter 5 regulations require school districts to provide either bilingual or ESL services to this ever-increasing population, they do not provide funding sources. Therefore local taxpayers must assume this responsibility and have become increasingly resentful towards some minority populations that have come into the area. These rural school districts have been unsuccessful in obtaining Title VII funding because of the system existing under the current law. The competitive process involved in obtaining these funds is usually awarded to larger consolidated school districts . . . In conclusion, we would like to make the following recommendations. We would like to ask the committee to consider in the reauthorization of Title VII moneys that the funding process be changed from the current competitive grants system to a program of formula structure. This could be based on identified LEP students utilizing figures in the preceding school year." Ibid. at 81–82.).

provided in the Bilingual Education Act, bilingual programs are those which make use of the student's native language in teaching English.[46]

The Bilingual Education Act defines "special alternative instruction programs" as:

an educational program for limited English proficient students that—

(A) utilizes specially designed English language curricula and services but does not use the student's native language for instructional purposes;

(B) enables the limited English proficient students to achieve English proficiency and academic mastery of subject matter content and higher order skills, including critical thinking so as to meet age-appropriate grade promotion and graduation standards in concert with the National Education Goals; and

(C) is particularly appropriate for schools where the diversity of the limited English proficient students' native languages and the small number of students speaking each respective language makes bilingual education impractical and where there is a critical shortage of bilingual education teachers."[47]

One researcher in the field has made the following suggestions to facilitate equal access:

- Re-examine findings from the effective teaching research. Extract principles that are applicable to education of LEP students.
- Extract factors in the research on effective schools and classrooms and apply to education of LEP students, e.g., campus policy prohibiting racial and ethnic slurs (orderly environment, high expectations).
- Require keeping data on indicators that affect outcomes, such as grade retention (leads to over-agedness), disciplinary measures, e.g., suspension (miss out on content coverage), public rewards (high level of students rewarded).
- Monitor and uphold prohibitions against tracking, ability grouping, assignment to special education and exclusion from talented and gifted programs.
- Make special efforts to enroll LEP students (and exited LEP students) in advanced math and science courses and gifted and talented programs. Document procedures for school districts to follow.
- Use native language or ESL techniques to teach LEP students enrolled in advanced courses.
- Emphasize the need for sending information home in a language that parents can understand.
- Involve parents of LEP students in Site Based Decision Making (SBDM) committees.
- Monitor innovative teaching techniques to determine if they accomplish the desired aim; participate actively, cover and learn the content, experience high rates of success.
- Ensure successful transition into English. Train the receiving teachers. Follow up for two years. Make provisions for re-enrollment of exited students in special services if needed.
- Assign a central office administrator to implement appropriate accountability procedures to assure student progress and success.[48]

The Institutional Level: Federal Court Interpretations of Antidiscrimination Prohibitions in Federal Civil Rights Laws

The Federal courts have interpreted the language of antidiscrimination prohibitions as requiring school districts to undertake the necessary action to eliminate barriers to participation in all activities offered by a public school system as a means of creating equal educational opportunity for students with limited English proficiency. For example, a Federal court in New York has held that: 1) a school district's bilingual program violated the Equal Educational Opportunities Act and the Department of Health, Education, and Welfare's guidelines in keeping Spanish-speaking students separate from English-speaking stu-

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45 *See* 20 U.S.C. § 7426(b)(2) (1994). This provision states that: "[g]rants for special alternative instructional programs under this subpart shall not exceed 25 percent of the funds provided for any type of grant under any section, or of the total funds provided, under this subpart for any fiscal year." *Id.*

46 *See* 20 U.S.C. § 7601(1)(A)–(D) (1994).

47 *See* 20 U.S.C. § 7601(15)(A)–(C) (1994).

48 *See* Alicia Salinas Sosa, "20 Years After *Lau*: In Pursuit of Equity, Not Just a Language Response Program," *Intercultural Development Research Association Newsletter*, vol. 22, no. 1 (January 1995), p. 22.

dents in music and art and failing to provide mechanisms for transfer out of the program for students who had reached level of proficiency in English sufficient to understand regular English instruction; and 2) the school district's proposed plan was deficient in providing no assurance that language deficient children in upper grades would be identified or that there would be sufficient remedial assistance.[49]

In *Castaneda v. Pickard*,[50] a Federal court set the current standard used by OCR in determining whether State and local educational agencies have met their obligation to take "appropriate action" to "overcome language barriers that impede the equal participation by students in its instructional programs."[51] In *Keyes v. Denver School District No. 1*,[52] a Federal court held that evidence of deficiencies in a school system's transitional bilingual education system violated section 1703(f) of the Equal Educational Opportunities Act. Section 1703(f) requires educational agencies to take appropriate action to "overcome language barriers that impede equal participation by its parents." Thus, the school system was properly required to take appropriate action to achieve equal educational opportunity for students with limited English proficiency. The elimination of such barriers reflects the essence of efforts to promote equal access and encourage students to maximize their potentials. As a Federal court in Illinois stated recently: "Every child, no matter their color, should have the opportunity to participate in all activities offered by a public school system. . . . No barrier to participation based upon a child's skin color may exist."[53] In addition, access must extend to *all* activities offered by a school district, including extracurricular activities: "A unitary school system extends beyond the classroom to extracurricular activities. . . . Segregation or discrimination in extracurricular programs is unlawful. The full range of extracurricular programs is subject to strict scrutiny."[54]

The Institutional Level: Factors School Districts Must Consider in Selecting a Program Model

Each State and local educational agency providing services to a population of students that includes students with limited English proficiency must decide how best to meet the educational needs of these students. In making this decision, there are several key variables that States and local educational agencies consider.[55] The first of these are school district or school demographics. There are many differences among school districts with respect to their populations of students with limited English proficiency. Some districts have large populations of students with limited English proficiency from a single language background.[56] Others have a large population of students with limited English proficiency representing a number of different languages.[57] A third group of school districts may have small numbers of students with limited Eng-

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49 Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57 (E.D.N.Y. 1978).

50 648 F.2d 989 (5th Cir. 1981)

51 *See* chap. 5, generally.

52 Keyes v. Denver Sch. Dist. No. 1, 576 F. Supp. 1503 (D. Colo. 1983), *aff'd in part, remanded*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

53 851 F. Supp. at 1184.

54 *See* 851 F. Supp. at 1183–84 (citing Green v. County School Bd. of New Kent. Co., Va., 391 U.S. 430, 435 (1968)); Arvizu v. Waco Indep. Sch. Dist., 732 F. Supp. 721, 724–25, 725 (W.D. Tex. 1989); Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 757 (5th Cir. 1989).

55 *See* Jeanne Rennie, "ESL and Bilingual Program Models," *ERIC Digest* (September 1993).

56 Ibid., p. 1.

57 Ibid.

lish proficiency from as many as 100 different language backgrounds.[58] Demographic factors that will influence the type of program a local school district selects include "the total number of language minority students, the number of students from each language background, and their distribution across grades and schools."[59]

A second important variable for local school districts to consider in choosing a program for its students with limited English proficiency is the characteristics of the students who will be participating in the program.[60] Some language minority students will arrive in the United States with a strong academic background in their own language. Others will have little school experience in their native language. The level of academic achievement as well as the level of English language proficiency will play roles in the school district's decision in selecting the appropriate program to meet the needs of its students.[61]

A third important variable a school district must consider in developing and implementing a program to serve its students with limited English proficiency is available resources.[62] A district with a significant number of language minority students over a long period of time will have teachers, aides, and administrators who are already trained in the development and implementation of programs for students with limited English proficiency.[63] They may be able to draw on a large pool of qualified bilingual teachers. Other school districts might find themselves faced with a sudden influx of students with limited English proficiency coming from more than one language background. Such school districts may not be equipped to provide native language instruction. Finally, a school district's material resources will of course play an important role in the program design the school chooses.[64]

Civil Rights Implementation, Compliance, and Enforcement Activities

Civil rights implementation, compliance, and enforcement activity associated with undertaking individualized and institutional efforts to eliminate barriers, provide equal access, and ensure that each student maximizes his or her potential are reflected in OCR's efforts to evaluate the overall effectiveness of an educational program. In the context of the *Castaneda* standard, program evaluation represents the final prong of the test used to determine whether a school district has met its legal obligations to students with limited English proficiency.[65]

OCR's Policy Guidance on Overall Program Evaluation and Educational Success Rates of Programs for Students With Limited English Proficiency

OCR's compliance analysis as enunciated in the September 1991 memorandum requires that the school district's program "succeed[], after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome."[66] OCR further defines the prac-

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58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid.

65 *See* 648 F. 2d 989, 1010 (5th Cir. 1981).

66 *See* Michael L. Williams, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, "Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited-English Proficiency (LEP stu-

tical meaning of this standard with the following language:

> Generally, "success" is measured in terms of whether the program is achieving the particular goals the recipient has established for the program. If the recipient has established no particular goals, the program is successful if its participants are over-coming their language barriers sufficiently well and sufficiently promptly to participate meaningfully in the recipient's programs.[67]

OCR further defines its compliance standards for measuring the meaningful access or participation in the school district's educational program with the following guidance:

> If a recipient contends that its LEP students have meaningful access to the district's programs, despite the lack of an alternative program or the presence of a program that is inadequate under *Castaneda*, some factors to consider in evaluating this claim are: (1) whether LEP students are performing as well as their non-LEP peers in the district, unless some other comparison seems more appropriate;[68] (2) whether LEP students are successfully participating in essentially all aspects of the school's curriculum without the use of simplified English materials; and (3) whether their dropout and retention-in-grade rates are comparable to those of their non-LEP peers. Cf. Keyes, 576 F. Supp. at 519 (high dropout rates and use of "levelled English" materials indicate that district is not providing equal educational opportunity for LEP students).[69]

The September 1991 memorandum states that "the type of program necessary to adequately identify students in need of services will vary widely depending on the demographics of the recipients' schools."[70] The level of formality of the program, including the nature of the identification and placement procedures, will be determined by such demographic factors as the number of students with limited English proficiency. The memorandum states that "[s]chools with a relatively large number of LEP students would be expected to have in place a more formal program" than school districts with few students with limited English proficiency.[71]

Whether the school district is implementing a "formal" or "informal" program, the third prong of the *Castaneda* test as enunciated in the September 1991 policy update requires that OCR conduct an overall program evaluation in making a Title VI/*Lau* compliance determination. As with other aspects of OCR's Title VI/*Lau* program, OCR relies heavily on the policy guidance provided in the September 1991 policy update in evaluating the overall implementation and success rates of local school district educational programs for students with limited English proficiency. However, OCR does not provide clear policy guidance in the September 1991 policy update or elsewhere in its investigative guidance on precise criteria for defining the term "more formal program" as it applies to or affects Title VI/*Lau* compliance requirements relating to educational programs for students with limited English proficiency.

Such guidance would be useful in clarifying Title VI/*Lau* compliance standards with respect to the practices necessary for a given school district to maintain or come into compliance. If OCR's Title VI/*Lau* policy makes distinctions between compliance standards on the basis of how formal the program and its requirements must be, then OCR policy should provide specific guidance in the form of criteria or examples to use for evaluating specific aspects of program development and implementation. For example, with re-

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dents)," to OCR Senior Staff, Sep. 27, 1991, p. 1 (hereafter cited as September 1991 memorandum).

67 *See* ibid., p. 9.

68 For example, when an overwhelming majority of students in a district are students with limited English proficiency, it may be more appropriate to compare their performance with their English proficient peers county- or statewide.

69 *See* September 1991 memorandum, p. 10.

70 Ibid., p. 9.

71 *See* ibid.

spect to identification and assessment procedures, OCR should clarify which ones would be needed for an educational program classified "more formal" and which one would be needed for a program classified as "informal." OCR staff conducting enforcement activities such as compliance reviews and complaint investigations would then have precise standards on which to rely in making compliance determinations regardless of the size of the school district or its population of students with limited English proficiency.

OCR's requirements for school districts in conducting *Lau* compliance reviews reflect minimum standards. From an institutional perspective, the school system's focus must be on achieving much more than minimum standards. School districts *must* prepare evaluation data on their *Lau* programs. OCR considers this a crucial aspect of compliance with Title VI based on the *Castaneda* standard. The schools must emphasize high standards for all students in order to achieve a high level of effectiveness in opening up its regular education program and the benefits that the program can provide. OCR undertakes to assist school districts in achieving more than this bare minimum through a program of technical assistance that is based largely on information sharing. For example, OCR will inform a school district that it is in noncompliance or is having problems about effective programs being implemented by other school districts.[72]

Partnership Process

OCR's regional enforcement offices have implemented innovative approaches and practices in performing this overall program evaluation. For example, the PAR review profiles[73] introduced in OCR's Kansas City Enforcement Office appear successful in accomplishing many of the factfinding activities performed by OCR staff in evaluating overall program evaluation in traditional compliance reviews and complaint investigations. In addition, the PAR reviews promote cooperative understandings between the school district and OCR, as well as the school district and local parent and community groups. However, the PAR reviews may not be foolproof means of conducting compliance reviews, since they lack the support provided by hard evidence obtained in traditional compliance reviews through OCR investigative techniques. As a result, school districts have less impetus for following through with an agreement resulting from a PAR review. It is, therefore, likely that more traditional compliance review and complaint investigation activity will remain the norm for OCR.[74]

Technical Assistance Activities

OCR provides an extensive array of technical assistance and resource materials to its regional staff to assist them in working with State and local education agencies on *Lau* compliance standards identified in the September 1991, December 1985, and May 1970 policy guidelines. These technical assistance materials include many different kinds of information, ranging from legal to policy to educational theory perspectives. Among recent materials headquarters has provided to OCR regional staff working on *Lau* compliance are the *Lau* glossary (a question and answer document on negotiation, monitoring, and enforcement activities emphasizing models for cases

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72 Angela D. Martinez, National *Lau* Facilitator, U.S. Department of Education, Office for Civil Rights, telephone interview, June 24, 27, 1996 (hereafter cited as Martinez interview). (Stating that: "[W]e let them know what other districts have done. We send out models, components of different plans.").

73 *See* chap. 5 for further discussion of the PAR reviews.

74 *See* Cathy H. Lewis, Acting Senior Enforcement Officer for the Western Part of the United States, Office for Civil Rights, Department of Education, interview in Washington, DC, June 14, 1996, p. 8 (noting that "[w]e also have some 'partnership' kind of efforts that we do with districts that may also result in a—here's sort of a gray area in between—some demonstrable outcome and that you may come away with an agreement and an understanding, 'you know we think we have problem and here's what we're going to do to address it' and we will also monitor those agreements but those aren't in a position to take to enforcement because we haven't done an investigation and we don't have the facts. If one of those monitoring arrangements fell apart we'd probably want to go back into the district and do a more traditional kind of investigation if we felt that was what was needed, always our bottom line, services to kids.").

where strong remedies are required)[75] and occasional newsletters covering new or noteworthy items on *Lau* compliance issues.

OCR's *Lau* technical assistance materials provide excellent support for the policy memoranda on which *Lau* compliance activities are based. However, there appears to be no cohesive means of presenting the information contained in these various documents.[76] A single manual or report containing all of these documents indexed by the issues or procedures that the documents cover might be a more effective way of presenting these materials to OCR staff. OCR's "*Lau* Team" has released several issues of a *Lau* News Bulletin. However, a more comprehensive single document may be very valuable as a reference or resource guide for OCR regional staff, particularly new staff members. Such a document may be a single manual, such as a "*Lau* Technical Assistance Manual."

Under OCR's organization before May 1996, OCR staff performed technical assistance functions such as coordination between school districts and desegregation assistance and language assistance centers, and development of technical assistance materials such as the *Lau* glossary, a document called "Strong Remedies for LEP Students," and the "Lau *Exchange*," an inhouse OCR informational and news periodical disseminated among OCR headquarters and regional staff.[77] In addition, this staff formed a "*Lau* working group" composed of headquarters and regional staff whose members acted as subject matter experts creating informational materials for various regional compliance specialists and State and local school district personnel. This working group provided technical assistance and outreach and education to school districts in understanding and meeting their legal responsibilities to students with limited English proficiency.

Before the May 1996 reorganization, OCR staff in the *Lau* working group did not undertake these technical assistance activities as part of their formal duties, but rather on an informal, "whenever time allows" basis.[78] Under OCR's May 1996 reorganization, all of the functions performed by the *Lau* working group are now tasked to the "program legal teams" within headquarters staff. However, program legal team staff will continue to perform these research, writing, coordination, and other technical assistance functions on the same informal basis as their predecessors. Nonetheless, these technical assistance functions remain a very important aspect of OCR's work. Technical assistance and education and outreach provide a direct way for OCR headquarters to work with OCR regional staff, State educational agencies, and local school districts in disseminating useful information, including promising educational practices and programs, that can help schools in developing and implementing programs to meet their legal obligations under Title VI and *Lau*. Moreover, OCR has not issued a "promising practices" document as a formal technical assistance document that could be disseminated by school districts within and across enforcement regions. OCR also has not issued reports based on meetings of its *Lau* interregional working group.

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75 U.S. Department of Education, Office for Civil Rights, Headquarters' *Lau* Team, "Strong Remedies for Limited English Proficient Students: Questions and Answers on Negotiation, Monitoring, and Enforcement," Sept. 29, 1995.

76 OCR has recently implemented an online research database referred to as the "electronic library." This database contains many hundreds of document generated by both headquarters and regional staff on *Lau* compliance and enforcement activities. The database organizes the documents into various "collections," such as the "technical assistance" collection, the "resource guide collection" and "policy document" collection. However, there is no single compilation of *Lau* materials within the database that might serve to offer a complete resource on *Lau*, particularly for staff who are new to *Lau* issues.

77 Alice Wender, Program Manager, D.C. Enforcement Office, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, July 18, 1996, pp. 6–7.

78 Ibid.

OCR's Findings in Evaluating Overall Efforts of States and Local School Districts

OCR attempts to assist State and local education agencies in attaining or maintaining compliance with *Lau* through a process that involves meeting with State superintendents to inform them about compliance activities in school districts throughout the State.[79] For example, OCR's Denver Enforcement Office recently prepared reports based on compliance reviews and monitoring activity. The director of OCR's Denver Enforcement Office presented these reports to State superintendents in Colorado, Arizona, and New Mexico.[80] The Denver Enforcement Office then worked with the State departments of education in all five States to provide them with technical assistance as the States, in turn, implemented their own technical assistance in helping school districts to address their *Lau* compliance problems.[81] For example, in New Mexico alone, this technical assistance activity in response to OCR's compliance review and monitoring activity has included technical assistance resource manuals, higher visibility in the State educational agency for bilingual directors, conferences for administrators and other school district personnel, and more accountability placed on school districts by the States. In another example, the State of Utah has appropriated $5 million dollars for teacher training.[82] In a third example, the Colorado State Department of Education, as a result of a complaint filed with OCR (one that was resolved between the State agency and the complainants), has prepared a technical assistance manual regarding school districts' educational services and responsibility for students with limited English proficiency.[83] Colorado school districts are also participating more frequently in OCR's conferences on *Lau* issues.[84]

OCR staff have found that the State statutes and policies already in place affect the enforcement and compliance activities OCR undertakes. For example, in OCR's Denver Enforcement Office, Arizona provides an example of a State that has well-developed and implemented statutes and policies, whereas Colorado, also in the Denver Enforcement Office, has not reached as high a level with respect to its statutory law or policy relating to civil rights compliance under *Lau*.[85] OCR's Denver Enforcement Office has found that for States with well-developed statutes and policies, compliance with Federal law is usually synonymous with State compliance. However, in States with very little statutory law or policy addressing *Lau* issues, school districts may have little or no State guidance on civil rights issues

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79 Martinez interview, pp. 9–10.

80 Ibid.

81 Ibid. (Stating that: "What we've done in our region is the following: we conducted reviews in five States—South Dakota was kind of an anomaly because we did one there—the other four, Utah, New Mexico, Colorado, and Arizona, we've done a number of compliance reviews geographically distributed throughout the State, different sizes of districts, different concerns, and we put together a table of noncompliance, along with the different things that we found in each school district where there were concerns. Our regional director met with the State superintendent in each of those areas, to let them know what was happening in their State, in the hopes that they would take on some voluntary action to get districts in compliance.").

82 Ibid., p. 10. (Stating that: "Utah, because of our meeting with them and because we've done a number of reviews within the State, have put together a technical assistance manual. Their bilingual director has been more visible in the State. They've had more conferences for administrators and other school district personnel. They've also had the districts become more accountable in terms of whether they'll be accredited. As a result of our efforts and a number of reviews that we've done, their Governor's office came up with $5 million dollars in training money for teachers. They've also put together some endorsement programs that they didn't have before in universities and colleges for staff to become endorsed in bilingual education or ESL. Their State department [of education], again, is more visible.").

83 Ibid.

84 Ibid.

85 Ibid.

concerning the rights under Title VI of national origin minority students who are limited English proficient. For example, Colorado only has a funding statute without any complementary civil rights statute or policy.[86] This statute, known as the English Language Proficiency Act (ELPA), requires only a test of oral language proficiency to determine that a given student has limited English proficiency.[87] As a result, Colorado school districts have interpreted this statute to mean that a test of oral language proficiency alone reflects a sufficient process for identifying limited English proficiency.[88] If students are found to be proficient, or nearly proficient, based on these test results, then some Colorado school districts end their inquiry there and these students are not provided with alternative language services when they may be in need of them.[89] This practice is contrary to OCR policy, which requires that the identification process undertaken by school districts must include the four language skill areas: speaking, reading, writing, and understanding.[90]

Elsewhere, States and local school districts developing and implementing "special alternative instructional programs" using Federal funding under the Bilingual Education Act sometimes are creating programs that rely heavily or solely on an "all-English" approach to teaching students with limited English proficiency. To the extent that schools or school districts offer programs under this provision that provide *only* English instruction, they may require special efforts by OCR in ensuring that they are complying with the mandates of *Lau* and OCR's Title VI policy guidelines, as these require "affirmative steps" to rectify language barriers created by a student's "inability to speak and understand the English language."[91] Therefore, ensuring Title VI/*Lau* compliance among schools conducting special alternative instructional programs that rely solely on English in instruction may require such efforts by OCR as guidelines for evaluating the effectiveness of such programs in overcoming language barriers; and compliance reviews specifically targeted to such programs. In addition, OCR might learn useful information from statistical data to compare the effectiveness of such programs with their stated goals with the effectiveness of bilingual programs funded under Title VII and other approaches such as ESL.

Although Title VII funds bilingual education, ESL, and special alternative instruction programs, to date OCR has not offered any guidance to States and local school districts specifically addressing the use of special alternative instructional programs. Interaction between OCR and OBEMLA in developing policy guidance and/or technical assistance materials as well as data collection on the development and implementation of special alternative instruction programs may prove useful in evaluating the success of these programs in providing effective participation and meaningful access within the meaning of *Lau* for students with limited English proficiency.

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86 Ibid.

87 Ibid.

88 Ibid.

89 Ibid.

90 Ibid.

91 *See* 35 Fed. Reg. 11,595 (1970).

Chapter 10

Findings and Recommendations

Conclusion

The numbers of students with limited English proficiency in the United States continue to grow dramatically. Students with limited English proficiency represent many different national origin backgrounds and many different languages. In coming years more and more children entering U.S. schools will come from homes where English is not the primary language spoken. Many of these students will be limited in their ability to speak, read, write, and comprehend in the all-English environment of the regular classroom. Certainly, students with limited English proficiency will not have the basic language tools required to achieve at the same level as students coming from homes where English is the primary language spoken. As a result, educating students with limited English proficiency, providing them with equal educational opportunities, and ensuring against discrimination on the basis of national origin more than ever before will require the concerted efforts of parents, school officials, educational policymakers, and a strong and effective Title VI civil rights implementation, compliance, and enforcement program by the Office for Civil Rights (OCR). The Commission's study and evaluation of OCR's Title VI/*Lau* efforts has revealed both strengths and major weaknesses.

OCR relies on several important legal foundations in undertaking efforts to ensure equal educational opportunity and nondiscrimination for students with limited English proficiency. These include Title VI of the Civil Rights Act of 1964 and a Supreme Court case interpreting Title VI, *Lau v. Nichols*. Title VI mandates nondiscrimination on the basis of race, color, or national origin. In 1974 the U.S. Supreme Court in *Lau v. Nichols* established that the nondiscrimination prohibition of Title VI applied to national origin minority students whose native language was other than English and who were precluded because of their limited English proficiency from meaningful participation in schools' regular educational programs. The *Lau* decision created a legal obligation for schools receiving Federal funds to ensure effective participation and meaningful access to the schools' regular educational programs for such students. OCR is responsible for enforcing Title VI and *Lau v. Nichols*.[1]

Aside from OCR, other agencies in the Federal Government play a role in ensuring equal educational opportunities for students with limited English proficiency. For example, shortly after the *Lau* decision, Congress enacted the Equal Educational Opportunities Act of 1974, which imposed on State and local educational agencies an affirmative duty to take "*appropriate action* to overcome language barriers" obstructing the academic progress of students with limited English proficiency. Although the Equal Educational Opportunities Act is enforced by the U.S. Department of Justice (DOJ), it has had an enormous impact on OCR's implementation, compliance, and enforcement of Title VI and *Lau*. In particular, a major court case interpreting the Equal

1 *See* chap. 4, pp. 69–70.

Educational Opportunities Act, *Castaneda v. Pickard*, established the analytical framework used by OCR in conducting its Title VI enforcement activities and gives practical meaning to the controversial term "appropriate action." Taken together, Title VI, *Lau*, and the Equal Educational Opportunities Act form the legal basis for ensuring equal educational opportunity for students with limited English proficiency.[2]

The Bilingual Education Act, enacted in 1968 and reauthorized periodically since then, is the second prong of the Federal Government's efforts to promote equal educational opportunity for students with limited English proficiency. This act authorized Federal funds to assist State and local educational agencies in meeting their obligation "to ensure equal educational opportunity for all children and youth and to promote educational excellence, [and] to assist State and local educational agencies . . . to build their capacity to establish, implement, and sustain programs of instruction for children and youth of limited English proficiency." Although the Bilingual Education Act is a program statute, not a civil rights law, it has been influential in funding school districts' efforts to take appropriate actions to overcome language barriers. The U.S. Department of Education's (DOEd) Office of Bilingual Education and Minority Languages Affairs (OBEMLA) has responsibility for administering the funds authorized under the Bilingual Education Act.[3]

In general, DOEd's Title VI/*Lau* enforcement program is a proactive program for promoting equal educational opportunity through civil rights implementation, compliance, and enforcement. DOEd, through the work of OCR, OBEMLA, and other offices, has played a major role in clarifying the vague language of "effective participation" and "meaningful access" used by the U.S. Supreme Court in *Lau*. DOEd has sought to imbue the Court's language with practical meaning for States and local school districts while allowing them the flexibility and latitude to develop their programs based on the educational approach of their choice. For example, in keeping with the tradition of local control over education, OCR has given State and local educational agencies wide latitude in choosing educational programs for students with limited English proficiency. OCR has interpreted the mandate of *Lau* and the nondiscrimination provision of Title VI to include requirements for schools to choose educational programs that are recognized as sound by at least some experts in the field of education, to implement their chosen educational programs effectively, and to ensure that their chosen educational programs are successful in overcoming the language barriers confronting students with limited English proficiency.[4]

In fulfilling its responsibilities under Title VI and *Lau*, OCR has developed an effective program relating to public elementary and secondary education. OCR has drawn on education research and standards in developing policies, crafting remedies, and creating technical assistance materials. OCR has developed innovative and creative new techniques in its compliance programs, such as the Profile, Assessment, and Resolution (PAR) reviews and school district "self-assessment guides." OCR also has developed an extensive network of contacts in the education community, including education researchers, educational psychologists, legal experts, and educators, and it has used its contacts to assist State and local educational agencies in complying with Title VI/*Lau*. OCR has produced a number of technical assistance and outreach and education materials to inform its staff, State and local education agency officials, students with limited English proficiency, and their parents/guardians about Title VI/*Lau* requirements. Moreover, OCR has developed a manual of "promising practices" that promote Title VI compliance. In addition, OCR staff has participated in training, workshops, and conferences in providing technical assistance and outreach and education support to school officials.

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2 *See* chap. 4, pp. 68–72.

3 *See* chap. 4, pp. 65–67.

4 *See* chap. 4, pp. 71–72.

OCR has acted as a facilitator for exchanging information among State and local educational agencies and regional desegregation assistance centers.[5]

OCR's current policy does not disturb the traditional State and local autonomy and flexibility in fashioning education programs to assist students with limited English proficiency in addressing their language barriers. For example, neither OCR nor DOEd in general seeks to dictate to State and local education agencies the kinds of education programs they should develop and implement to address language barriers. Schools remain free to choose from a wide variety of instructional methodologies and approaches, including bilingual education, English as a Second Language, and an array of other language assistance programs. OCR has not sought to encumber States and local school districts in determining which students are "limited English proficient" or in developing criteria for evaluating and placing such students once they have been identified. Overall, OCR has shown exemplary restraint in respecting State and local prerogatives in that it has not sought to place limits on State and local discretion by imposing requirements that in any way limit this discretion.

Despite these positive aspects, OCR's Title VI/*Lau* program continues to suffer in its efforts to play a major role in ensuring equal educational opportunity for students with limited English proficiency because of a number of weaknesses. For example, since 1990, OCR has placed a high priority on issues related to students with limited English proficiency, but it has failed to issue policy guidance on compliance relating to the development and implementation of educational programs for students with limited English proficiency since a May 1970 policy memorandum published in the *Federal Register*. Moreover, in its policies and case letters, OCR has used such terms as "national origin minority," "students whose primary home language is other than English," and "limited-English proficient" without providing clear definitions. OCR's Title VI regulations provide no definitions for these terms, and they offer no criteria for establishing when a student's language needs place him or her among the students *Lau* and the guidelines contained in the May 1970 memorandum intended to benefit. OCR has not provided sufficient guidance for States and local educational agencies to use in establishing consistent definitions and understanding of the term, "limited English proficient."

OCR's compliance and enforcement of Title VI suffers also in that its letters of findings, which serve as one of the principal sources of written contact between OCR and the school districts, generally appear insufficient in providing clear, precise, readily accessible language in explaining the civil rights laws, regulations, and policies on which OCR bases its compliance and enforcement activities. OCR has failed to ensure that letters of findings and other written contacts with school districts provide the districts with the most complete and thorough analysis of OCR policy possible. OCR has failed to explain in practical terms the meaning of the legal terminology it uses.

In addition, OCR's Title VI/*Lau* program suffers because OCR has not taken steps to develop a consistent working relationship with OBEMLA. More formal collaboration between the two offices would ensure that OCR's Title VI/*Lau* implementation, compliance, and enforcement program makes optimal use of OBEMLA's greater expertise on education issues and its knowledge of successful educational practices and the latest educational research related to students with limited English proficiency. OCR has not drawn effectively on OBEMLA's educational expertise in the development of Title VI/*Lau* policy, remedies, technical assistance, training, and education materials. OCR has not provided its headquarters and regional staff with regular training on specific educational practices or briefed them on the latest educational issues or debates that may have Title VI/*Lau* implications.

DOEd has not integrated fully five critical principles into its civil rights implementation, compliance, and enforcement program. These five critical principles, fundamental to the meaning of equal educational opportunity, must be incorpo-

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5 *See* chap. 7, pp. 80–81.

rated into educational programs for students with limited English proficiency to ensure that they are afforded equal educational opportunities. The five principles are:

1) providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents in their children's education;
2) utilizing neutral and nondiscriminatory diagnostic and screening procedures when placing students in educational programs;
3) structuring education programs designed to serve a diverse student population by maintaining a primary objective to place students in regular classes to the greatest extent possible; grouping students to reflect differential ability in various subjects; reevaluating and regrouping students periodically to reflect both the differential ability in various subjects and changes in achievement, performance, and development;
4) evaluating and allocating teachers, facilities, and other resources among education programs; and
5) undertaking individualized and institutional efforts to eliminate all barriers; provide equal access to all subjects, activities, and career opportunities; and ensure that each student maximizes his or her potential opportunities.

The following examples illustrate the inadequacy of OCR's efforts to address and incorporate these principles into its Title VI/*Lau* implementation, compliance, and enforcement program. OCR has not addressed the issues of adequate parental notification and the promotion of parental involvement in its *Lau* policies. OCR, therefore, does not offer guidance to school districts on requirements or recommendations addressing parental notification and involvement.

In seeking to ensure that school districts utilize neutral and nondiscriminatory screening and diagnostic procedures, OCR addresses some topics related to identification, assessment, and placement through its compliance and enforcement activities, and it includes discussion of identification and assessment procedures in its September 1991 memorandum, December 1985 memorandum, *Lau* investigative plans, and staff training materials. However, OCR has not issued comprehensive policy guidance on these issues. Without such policy from OCR, school districts are left with little Federal guidance on the criteria that are necessary for a school district's identification, assessment, and placement procedures to be in compliance with the requirements of Title VI under *Lau*.

Further, *Lau* policy guidance, such as the September 1991 memorandum, does not discuss the applicability of the disparate impact theory to OCR's civil rights policy. Disparate impact analyses are essential for determining whether a school district's education programs cause segregation or otherwise adversely affect students with limited English proficiency. Other weaknesses in OCR's Title VI/*Lau* program include OCR's failure to issue a policy addressing evaluation and allocation of teachers. Although OCR appropriately places an emphasis on the role of teachers in the development and implementation of education programs in conducting civil rights compliance, OCR's *Lau* polices do not address this issue.

Thus, by failing to address these principles adequately in its enforcement of Title VI and *Lau*, OCR has not provided State and local education agencies with the type of guidance that would afford them a concrete understanding of their obligations under the law and point them in the direction of a proactive civil rights agenda that would ensure equal educational opportunity for students with limited English proficiency.

OCR must continue to enforce Title VI vigorously and continue to seek the most effective means of accomplishing its objectives. More important, by integrating the five principles identified throughout this report fully into its implementation, compliance, and enforcement efforts and implementing the other recommendations below, OCR can further realize its mission "to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."

The U.S. Commission on Civil Rights presents specific findings and recommendations based on its study of DOEd's enforcement of Title VI and *Lau* and its focus on public elementary and secondary education for students with limited English proficiency.

General Findings and Recommendations

Finding: In general, DOEd's enforcement of Title VI and *Lau* demonstrates a commitment to the promotion of equal educational opportunity through civil rights implementation, compliance, and enforcement. OCR has taken a number of innovative steps to enhance its enforcement of Title VI and *Lau*. However, the Commission has identified several critical areas where OCR's efforts to date have been insufficient to ensure equal educational opportunities for students with limited English proficiency. In particular, the Commission found that OCR has not adequately focused its implementation, compliance, and enforcement on the five critical principles listed above that need to be incorporated into educational programs for students with limited English proficiency to ensure that they are afforded equal educational opportunities.

This report has demonstrated that these principles are fundamental to the meaning of equal educational opportunity and essential for carrying out the mandate of Title VI to ensure that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded in participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[6] The five principles share the same objectives as those contemplated in Titles IV and VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974. The Equal Educational Opportunities Act, in particular, embodies the five principles in its requirements that schools practice nondiscrimination and adopt a proactive civil rights remedial scheme broadly identified as "appropriate action."[7]

The Equal Educational Opportunities Act requires school districts to take "affirmative steps" to overcome students' language barriers. In interpreting the "affirmative steps" language of the act in *Castaneda v. Pickard*, the fifth circuit developed a standard that imbued it with practical meaning for school districts in developing and implementing educational programs for such students. The three prongs that comprise the *Castaneda* standard incorporate, in some fashion, all of the elements of program implementation identified in the Commission's five principles. For example, the *Castaneda* standard includes an inquiry into the quality of school districts' program implementation. In making this evaluation, the Federal courts and OCR can employ numerous criteria. Among these criteria are the five principles: school districts' efforts in providing qualified teachers and equal access to facilities and other resources, parental notification and involvement, nondiscriminatory and neutral screening and diagnostic procedures, education programs with the least segregative effects for students who are limited English proficient, and institutional efforts to eliminate barriers and promoting equal access to all subjects, activities, and career opportunities.

By focusing on the five principles when developing and implementing educational programs, school districts can successfully provide the "effective participation" and "meaningful access" required under Federal civil rights laws. In turn, successful civil rights enforcement based on equal educational opportunity, whether as a remedial or preventive scheme, requires that schools meet high standards of quality in implementing of each of the five principles.

The Commission found that although many of these principles are addressed in one way or another by OCR in its Title VI/*Lau* civil rights implementation, compliance, and enforcement, none of the principles has been fully developed as a central component of OCR's policies or activities, and OCR has not adequately explored or disseminated the importance of incorporating these principles into educational programs to ensure equal educational opportunities for students with limited English proficiency.[8]

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6 42 U.S.C. § 2000d (1988).

7 *See* chap. 4, pp. 93–94.

8 *See* chap. 4, pp. 92–96.

Recommendation: In developing a program for language minority students, school districts should, at a minimum, focus on five key principles: (1) providing parental notification and encouraging parental inclusion; (2) utilizing neutral and nondiscriminatory screening and diagnostic procedures; (3) structuring educational programs to serve a diverse student population by maintaining a primary objective to place all students in the regular education classroom and core academic curriculum to the greatest extent possible, grouping students to reflect differential ability in various subjects, and reevaluating and regrouping students periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development; (4) evaluating and allocating teachers, facilities, and other resources among education programs; and (5) undertaking institutional efforts to eliminate all barriers, promoting equal access to all subjects, activities, and career opportunities and counseling each student to maximize his or her potential opportunities.

OCR should develop policy guidance that explicitly states that implementing the five principles is inherent in the meaning of taking "appropriate action" and "affirmative steps," and shows how the five principles can foster "effective participation," and "meaningful access." OCR should develop and disseminate technical assistance documents that use these five principles as a comprehensive framework for promoting equal educational opportunity, ensuring nondiscrimination, and providing effective responses to Federal civil rights requirements. These policy guidance and technical assistance documents will provide working definitions for the legal requirements and provide school districts with practical guidance on complying with Title VI and *Lau*. Above all, ensuring equal educational opportunities for students with limited English proficiency requires OCR, in conducting its civil rights implementation, compliance and enforcement activities, to encourage school officials to develop and implement education programs that treat each child as an individual with unique needs, talents, and abilities.

In addition, however, OCR should immediately convene a task force of civil rights experts, educational experts, teachers, administrators, parents, students, and policymakers to develop and disseminate a comprehensive Promising Practices and Programs for Serving Limited English Proficient Students manual that incorporates all of the following principles: (1) providing parental notification and encouraging parental inclusion; (2) utilizing neutral and nondiscriminatory screening and diagnostic procedures; (3) structuring educational programs to serve a diverse student population by maintaining a primary objective to place all students in the regular education classroom and core academic curriculum to the greatest extent possible, grouping students to reflect differential ability in various subjects, and reevaluating and regrouping students periodically to reflect both the differential ability in various subjects and changes in achievement, performance, and development; (4) evaluating and allocating teachers, facilities, and other resources among education programs; and (5) undertaking institutional efforts to eliminate all barriers, promoting equal access to all subjects, activities, and career opportunities, and counseling each student to maximize his or her potential opportunities. Specifically, the manual should include examples of effective educational programs for limited English proficient students that have incorporated the above principles in their development and implementation.

Chapter 2. National Statistical Trends for Students with Limited English Proficiency

General Finding on National Statistical Trends Data

Finding: In readily available annual reports, DOEd, in particular the National Center for Education Statistics (NCES), often presents data as isolated numbers without adequate explanations of the meaning and limitations of the data presented. For instance, DOEd reports do not distinguish adequately among various levels of English language proficiency, nor do they clearly define "Speak English well" compared to "Speak English with difficulty"; and they do not discuss the relative merits of measures and indicators of educational attainment (e.g., enrollment, dropout, retention, and high school completion rates). As a result, users of NCES reports often are not pro-

vided with sufficient information to make informed decisions based on the data.[9]

Recommendation: NCES should cease presenting data as isolated numbers, unless it provides adequate explanations of the meaning and limitations of the data presented. NCES should provide the users of its reports clear definitions of various terms or words such as "Speak English well" compared to "Speak English with difficulty." NCES should distinguish adequately among various levels of English language proficiency. NCES should provide the users of its reports a summary of the relative merits of measures and indicators of educational attainment (e.g., enrollment, dropout, retention, and high school completion rates). Such summaries would assist the users of NCES' reports in understanding how to interpret the data for educational program development.

Specific Findings and Recommendations

Finding: Various NCES compendia, such as the *Condition of Education*, as well as education researchers and policymakers, rely on decennial U.S. census data to analyze or report on the status of language minority students. For instance, the *Condition of Education 1994* reported on each State's number of 5- to 17-year-olds who spoke other languages and of those youngsters, the number who spoke English "with difficulty."[10] Researchers who focus on language minority children also have relied on decennial census data to examine their educational status, and report on the number of home speakers of a particular language[11] or the percentage of children and youth (5- to 19-year-olds) who are enrolled in school.[12]

The NCES' periodic *Schools and Staffing Survey* has collected and reported on the share of total public school enrollment that students with limited English proficiency occupy in each State. However, NCES reported that in several States (e.g., Nebraska, West Virginia), there were too few students with limited English proficiency to estimate their share of total enrollment.[13] In addition, this survey was formerly administered every 3 years, but now will be on a 5-year cycle. The next survey is not scheduled until 1998–1999. A further limitation of these data is that they are collected from only a sample of the Nation's schools, and not all of the survey recipients complete the instrument.[14]

Each year, OBEMLA obtains data from State education agencies that specifically participate in the Title VII program. The purpose of this survey is to collect and report information on the number of students with limited English proficiency in each State. However, the reported count in each State does not represent the total population of students with limited English proficiency for several reasons. First, in any given year, not all State education agencies participate in the OBEMLA SEA program, and nonparticipants would thereby not report on students with limited English proficiency who reside in those States. For instance, in 1993–1994, Pennsylvania, Virginia, and West Virginia did not participate in the SEA program. In addition, some State grantees may undercount the number of students with limited English proficiency, and students with limited English proficiency attending private institutions are undercounted consistently.[15]

Recommendation: DOEd, specifically NCES or OBEMLA, should collect annual data on the number of students with limited English proficiency in the Nation's public schools and report these data by State. Researchers can use these data to:

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9 *See* chap. 2, generally.

10 *See* table 2.1.

11 *See* table 2.2.

12 *See* table 2.7.

13 *See* table 2.4.

14 *See* chap. 2, p. 23.

15 *See* chap. 2, pp. 18–19.

(a) examine the increases and decreases in the population of students with limited English proficiency within a given State, (b) determine the share of total public school enrollment occupied by students with limited English proficiency, and (c) compare various States' total enrollment of students with limited English proficiency or compare the share of the States' public school enrollment occupied by students with limited English proficiency by year.

If DOEd is unable to collect these data annually, then the agency should have a policy of justifying the particular data selected for its published reports that are used by members of the education community who are concerned about equal educational opportunity. If the most recent edition of a DOEd document(s) is at least 2 years subsequent to the data and other information incorporated about students with limited English proficiency, then DOEd should briefly explain how the data were "treated" (e.g., how the unreported values were adjusted) from the time of collection, analysis and other technical processes, determination of final figures for publication, to the write-up of reports. DOEd should justify the duration/time lapse between data collection and publication.

As a result, researchers, policymakers, and educators would: (a) have a clearer understanding that the intervening time between the data collection and publication dates was used to improve the quality of the data and (b) have access to the most accurate possible information to make assessments and decisions about students with limited English proficiency that reflect the concern about equal education opportunity, to determine appropriate education placement settings, instructional techniques, and supplemental services needed.

Finding: In various NCES documents, such as the *Condition of Education*, the agency provides U.S. census data that divide language minority students into two categories: (1) those who speak English "very well" and (2) those who speak English less than "very well," or "with difficulty." These vague self-reported terms, such as "very well" and "with difficulty" are subjective and prone to misinterpretation.[16]

Recommendation: NCES should distinguish between the two major categories, "very well" and "with difficulty." However, it is possible that NCES, after consulting with the U.S. Bureau of the Census or examining the census form's home language question, may need to state directly in documents that report data on language minority students that the Bureau of the Census does not provide any guidelines or instructions on assessing one's own extent of English proficiency. Thus, if NCES cannot obtain any further clarification on interpreting terms such as "very well" or "with difficulty," then the agency should state this point in a footnote to its published tables. An appended statement can prevent researchers and policymakers who regularly use DOEd compendia from aiming unnecessarily to obtain specific definitions of terms that self-assess English proficiency.

Finding: NCES, in sources such as *Schools and Staffing Survey* and *Condition of Education*, does not clarify the distinction between: (a) language minority children who have difficulty speaking English and (b) students who are identified by their State and/or school district as limited English proficient. Language minority status is determined by a decennial Census question in regard to the respondent's home language. Nonnative English speakers are considered as members of a language minority. A part of this population is English proficient while another part is not. The census determines English oral proficiency by using responses to a question that is asked about those who speak a language other than English at home: "How well does this person speak English?" Persons who reply less than "very well" are classified as those who "speak English with difficulty."

Students who speak English with difficulty are a subset of the population of students with limited English proficiency and do not represent the entire population of students classified as limited English proficient. Students who are limited Eng-

16 *See* tables 2.1, 2.7, and 2.8, and chap. 2, pp. 15, 17.

lish proficient include those who have difficulty in speaking, reading, writing, and/or understanding the English language. Thus, it is possible to speak English well but have difficulty in these other proficiency areas.[17]

Recommendation: NCES, in sources such as *Schools and Staffing Survey* and *Condition of Education*, should explicitly convey to researchers interested in determining the number of students with limited English proficiency that basing limited English proficiency status on speaking ability alone does not account for other language minority members who may speak English well but are limited in their ability to read, write, or comprehend the language. These limitations can affect students' academic performance and deny these individuals the opportunities to learn successfully in the classroom. Moreover, when presenting information about the language minority student population, NCES should explain in a footnote appended to *Condition of Education* tables that as a matter of civil rights, school districts are not allowed to base their concept of "English proficiency" exclusively on English-speaking skills, thereby restricting English language instruction classes to students who have difficulty with oral proficiency in English.

Finding: NCES does not provide sufficient information on the number or percentage of students with limited English proficiency who receive Federal, State, and/or locally supported services. Therefore, researchers who rely on NCES documents cannot determine the size of the "underserved" population (i.e., the number of students with limited English proficiency who are being denied the English language acquisition classes that enable them to attain equal opportunity to learn successfully in classrooms where English is the language of instruction).

Data are presented in NCES documents on the number and percentage of students with limited English proficiency[18] in each State.[19] Similarly, data are provided on the percentages of elementary and secondary schools that offer ESL and bilingual education programs and the number and percentages of the Nation's students who participate in these programs. NCES also publishes data on percentages of the Nation's students who attend public schools that offer ESL and bilingual education. However, DOEd does not provide accessible data specifically on the numbers and percentages of students with limited English proficiency who are direct beneficiaries of language acquisition classes.[20]

Recommendation: NCES or OBEMLA should provide readily accessible (annually, if possible) information on the number and percentage of students with limited English proficiency who attend English acquisition classes. DOEd's Office of Special Education and Rehabilitative Services (OSERS) presents data annually on percentages of disabled students who are distributed among the various education placement settings. NCES or OBEMLA should provide similar information on students with limited English proficiency.

In addition, NCES should also include information on the number of students with limited English proficiency who enrolled in each State's public schools. With data on the exact number of students with limited English proficiency, and the precise source of total K–12 public school enrollment, users of DOEd data can thereby calculate, for any particular State, the exact percentage of students enrolled in public school with limited English proficiency.

Chapter 3. Background

Defining Limited English Proficiency

Finding: Recognizing that the term "inability to speak and understand English" must refer not only to a total lack of English language capability but also to a limited proficiency in the language,

17 *See* chap. 2, generally.

18 *See* table 2.3.

19 *See* table 2.4.

20 *See* chap. 2, pp. 27–30.

policymakers, practitioners, and civil rights enforcement authorities such as OCR have adopted the term "limited English proficiency." The prevalent use of this term has resulted in a subjective definition for the target group that lacks an appropriate standard of comparison. For example, Congress has provided a legal definition for the term "limited English proficient" in the Bilingual Education Act. This definition succeeds in reflecting an educational perspective on language proficiency in that it identifies language proficiency in terms of its basic components (e.g., speaking, reading, writing, and comprehension). OBEMLA has noted that this definition is limited to a description of students with limited English proficiency relative to a student's ability to function in the all-English classroom. As with similar terminology in the Equal Educational Opportunities Act and OCR policy guidance, this language adopts the consensus that students with limited English proficiency are those who, by some measure, have insufficient English language capabilities to succeed in an all-English classroom environment. However, the definition does not provide a standard against which to measure proficiency relative to the students who are deemed "English proficient." The notion of such a standard of comparison is consistent with an educational perspective for identifying students with limited English proficiency. For example, two educational scholars suggest that the term "limited English proficiency" should be defined in law and policy as referring "to the lack of facility, fluency, or linguistic competence in *English as a second language relative to* the normal native speaker-listener of the language."

Educational research has not produced a single definition for the concepts of "English proficiency" and "limited English proficiency." However, the research underscores the complexity of bilingualism and the acquisition of English for students who are limited English proficient. Education researchers Hamayan and Damico have stated that "[l]anguage proficiency . . . is a complex, multifaceted, multileveled, and variable phenomenon."[21]

Recommendation: OCR should issue Title VI policy addressing the definition of "limited English proficiency." Such policy guidance could assist State and local educational agencies in establishing consistent definitions and understanding of the term. Like the definition of limited English proficiency in the Bilingual Education Act, the definition should be informed by an educational perspective to provide more precision and clarity. For example, the definition should include basic components of language proficiency (e.g., speaking, reading, writing, and understanding). In addressing the definition of limited English proficiency, OCR should consider the complexities involved in identifying language minority students with limited English proficiency and developing educational programs to meet their needs.

Chapter 4. The U.S. Department of Education Office for Civil Rights

OCR and OBEMLA

Finding: OCR and OBEMLA share important responsibilities related to providing equal educational opportunity to students with limited English proficiency. As DOEd's inhouse education expert, OBEMLA is in an ideal position to help OCR integrate educational perspectives into its civil rights policy. Yet, with limited exceptions, the two offices operate independently of one another, with little coordination of their activities. Although OCR occasionally consults with OBEMLA on educational matters relating to students with limited English proficiency, its interactions with OBEMLA have been on informal and ad hoc. There is no formal mechanism to ensure that the two offices work collaboratively to promote equal educational opportunity. For instance, although OCR has a formal memorandum of understanding with the Office of Special Education and Rehabilitative Services, there currently is no formal memorandum of understanding between OCR and OBEMLA. OCR does not mention OBEMLA in its 1994 Strategic Plan.

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21 *See* chap. 3, pp. 39–42.

OBEMLA's role in civil rights enforcement is limited. Formally, it has no responsibilities for civil rights enforcement. Based on DOEd's organization and division of functions, OCR is the sole office within DOEd with civil rights enforcement responsibilities. Consequently, OBEMLA's role in civil rights is limited to ensuring that grant applicants have submitted a signed form assuring that they do not discriminate. It also consists of reviewing and providing comment on OCR's draft regulations and policies as they relate to OBEMLA's programmatic functions. OBEMLA does not conduct independent investigations of civil rights issues, nor does it provide technical assistance to grantees on civil rights compliance. Rather, OBEMLA refers information on noncompliance and requests for technical assistance to OCR.

OCR's policy guidance is based largely on court interpretations of Title VI, *Lau*, and the Equal Educational Opportunity Act and not on scholarship on effective educational practices for overcoming barriers. However, the courts have less expertise than educational experts in developing educationally sound or justifiable practices, such as assessment procedures. The legal theories underlying OCR's civil rights compliance efforts must be infused with educational perspectives to serve as effective tools for ensuring equal educational opportunity.[22]

Recommendation: OCR should draw on OBEMLA's educational expertise in the development of Title VI/*Lau* policy, remedies, and technical assistance, training, and education materials. OCR should ask OBEMLA to provide its headquarters and regional staff with regular training on specific educational practices and brief them on the latest educational issues or debates that may have Title VI/*Lau* implications. OCR should work jointly with OBEMLA to enhance its "Promising Practices" document and in providing other forms of technical assistance to State and local educational agencies.

To ensure that such collaboration becomes an integral part of each office's responsibilities, OCR and OBEMLA should develop a memorandum of understanding modeled after the memorandum of understanding between OCR and the Office of Special Education and Rehabilitative Services, but reflecting the unique relationship between OCR and OBEMLA. The memorandum of understanding should ensure that OCR can avail itself of OBEMLA's educational expertise as it conducts its civil rights activities, such as investigation of educational agencies; and negotiations of remedies for violations found; monitoring of compliance plans. It should provide for the exchange of information and opportunities to conduct joint technical assistance activities. In addition, it should ensure that OBEMLA and OCR work cooperatively to improve OCR's understanding of the pedagogical aspects of educating children and youth with limited English proficiency. It also should require OBEMLA to provide informational resources that assist in developing remedies or offering alternative nondiscriminatory educational criteria and practices to schools. Were OCR to develop such a memorandum of understanding with OBEMLA, it would accomplish many of the same goals in DOEd's efforts to ensure equal educational opportunity for students with limited English proficiency that the existing memorandum of understanding between OCR and Office of Special Education and Rehabilitative Services accomplishes for students with disabilities.

In addition to a memorandum of understanding with OBEMLA, OCR should include its interaction with OBEMLA in its Strategic Plans. This will allow OCR to establish priorities, goals, and timetables for the interaction between the two offices and ensure that such interaction is given the necessary attention to ensure coordinated efforts between the two offices to ensure that students with limited English proficiency are afforded equal educational opportunity.

OCR's Current Title VI/*Lau* Policy

Finding: Since 1990, OCR has placed a high priority on issues related to students with limited English proficiency, but it has not published formal guidelines on compliance issues relating to the development and implementation of educa-

22 *See* chap. 4, pp. 65–67.

tional programs for these students since a May 1970 policy memorandum published in the *Federal Register*. OCR's policies and other written documents have not defined the term "limited English proficiency" or other related terms. In its policies and case letters, OCR has used the terms "national origin minority," "students whose primary home language is other than English," and "limited-English proficient" without providing clear definitions. Further, the Title VI regulations provide no definitions for these terms, and they offer no criteria for establishing when a student's language needs place him or her among the students *Lau* and the guidelines contained in the May 1970 memorandum are intended to benefit. With definitions for these terms in policies, OCR could offer clearer guidance to school districts in identifying students who may need an alternative language education program to gain meaningful access to a school's regular educational program.

OCR's policy guidelines constitute a well-structured, cohesive articulation of the procedural analysis it uses in conducting the work of implementing and enforcing Title VI through evaluating school systems. However, OCR does not elaborate on the meaning of terminology used in its policy guidance and other written guidelines.[23]

Recommendation: OCR should issue a policy memorandum containing a thorough, thoughtful discussion of all civil rights issues, both legal and educational, relating to the education of students with limited English proficiency. The policy memorandum should provide guidelines to schools on their legal obligations in preventing discrimination against students with limited English proficiency. To provide greater clarity in Title VI/*Lau* cases, OCR should provide definitions of terms such as "national origin," "national origin minority," "primary home language is other than English," "limited English proficiency," and "no English proficiency." The policy guidance should provide criteria for determining when a student's language needs qualify him or her as a beneficiary of the *Lau* mandate.

Finding: OCR's primary analytical basis for determining Title VI compliance in *Lau* enforcement is the fifth circuit's tripartite standard, announced in *Castaneda v. Pickard*, interpreting the "appropriate action" language of the Equal Educational Opportunities Act.[24] OCR policy, therefore, is based on an interpretation of the language of section 1703(f) of the Equal Educational Opportunities Act that requires school districts to take action to remove the "language barriers" that operate to deprive students with limited English proficiency of equal educational opportunity. However, there is no mention of section 1703(f) of the Equal Educational Opportunities Act in OCR's Title VI regulation, and no provision in the Title VI regulations directly addresses school districts' obligations towards students with limited English proficiency.[25]

Recommendation: To provide greater clarity on Title VI's requirements relating to students with limited English proficiency, OCR should issue a policy memorandum with a discussion of the relationship between Title VI and *Castaneda* and the Equal Educational Opportunities Act. This policy memorandum should include a thorough discussion of the Equal Educational Opportunities Act, since, although OCR does not have enforcement responsibility for this statute, it does rely heavily on a Federal judicial interpretation of this statute's nondiscrimination provision in conducting its evaluations of school districts' Title VI and *Lau* compliance efforts. The memorandum also should include a discussion of this statute, the fifth circuit's opinion in *Castaneda*, and the relevance of this law to OCR's Title VI implementation, enforcement, and compliance efforts. The policy memorandum will clarify school districts' obligations to take affirmative steps or "appropriate action" to remove the language barriers pre-

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23 *See* chap. 4, p. 73.

24 OCR does not have enforcement responsibility for the Equal Educational Opportunities Act. Responsibility for enforcing this statute lies with the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section.

25 *See* chap. 4, pp. 69–71, 73–75.

venting students with limited English proficiency from participating effectively in schools' regular educational programs.

Denial of Equal Participation

Finding: OCR's May 1970 policy guidance has been extremely influential in the development of Federal law and policy for students with limited English proficiency. The U.S. Supreme Court relied on this requirement in its ruling in *Lau*. Congress, in turn, used the *Lau* holding as the basis for the antidiscrimination provision in the Equal Educational Opportunities Act, which is enforced by the DOJ's Civil Rights Division. The act's antidiscrimination provision requires school systems to take "appropriate action to overcome language barriers that impede equal participation." This requirement informs the analytical approach to Title VI compliance that OCR uses in conducting enforcement of Title VI and *Lau*, such as complaint investigations and compliance reviews. As such, this language remains crucial in providing guidance to Federal education policymakers, Federal civil rights enforcement authorities, and State and local educational agencies and their officials. In relying on this language, Congress, the courts, and the executive branch have given a large amount of discretion to State and local educational agencies. For example, the State and local educational agencies determine the meaning of "effective participation" as it applies to their educational programs. They also retain broad discretion in developing the programs through which they will comply with the requirement to take "affirmative steps" or "appropriate action."[26]

Recommendation: Congress and DOEd should continue to give State and local educational agencies the broad discretion that has always been their prerogative in matters of education to determine what programs to offer to students with limited English language proficiency. OCR must ensure that language barriers are not impeding equal or effective participation of national origin minority students in public elementary and secondary education. OCR must provide school districts with clear guidance on their legal obligations pursuant to Title VI and *Lau*, OCR should issue policy guidance that gives practical meaning to the terms "effective participation" and "appropriate action" through specific criteria and clearly drawn examples of their application. In addition, OCR should conduct technical assistance and outreach and education on this issue. For instance, OCR should ensure that the policy guidance is widely disseminated to school districts across the Nation.

"Equal" v. Effective Participation

Finding: In *Lau v. Nichols*, the U.S. Supreme Court upheld OCR's requirement that schools ensure that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[27] In the Equal Educational Opportunities Act, Congress used similar language in its requirement that schools must "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

However, where OCR and the Supreme Court have required "effective participation," Congress mandated that schools provide "*equal* participation." The two terms, while seemingly similar, may be interpreted to have quite different meanings. Of the two, "equal participation" seems far more consistent with the spirit and intent of Title VI. In addition, the equal treatment mandated by the Court in *Brown v. Board of Education* arguably should apply under an equal protection analysis. These are important differences between the meanings of the terms "equal" and "effective" participation. Because the term "effective" can be viewed as something less than "equal," it appears

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26 *See* chap. 4, pp. 83–84.

27 414 U.S. 563, 568.

that there is confusion as to what the requirement for school districts actually means. The term "equal," however, is far less ambiguous, has stronger precedent behind it, and would therefore provide a standard more consistent with the principles of equal opportunity. In addition, the presumably stronger language of "equal participation" is not used in Title VI/*Lau* cases, because OCR's basis is "effective participation."[28]

Recommendation: OCR should issue a policy memorandum discussing the distinction, if any, between the meanings of "effective participation" and "equal participation," and clarify which standard applies to Title VI/*Lau* compliance.

Enforcement Responsibilities for the Equal Educational Opportunities Act of 1974

Finding: Congress has given enforcement responsibilities for the Equal Educational Opportunities Act to DOJ, where the statute is enforced by the Civil Rights Division, Educational Opportunities Section. However, the provisions of the Equal Educational Opportunities Act, in particular section 1703(f) relating to overcoming language barriers, are very closely related to the work done by OCR.[29]

Recommendation: DOJ and OCR should coordinate more closely in ensuring that the legal obligations for State and local education agencies contained in the provisions of the Equal Educational Opportunities Act are implemented properly.

Site Selection Criteria

Finding: In its 1994 Strategic Plan, OCR decided to focus most of its staff and resources on large school districts and, as a result, has largely excluded school districts with small numbers of students with limited English proficiency from many of its proactive activities. The challenges facing districts with small numbers of students with limited English proficiency are likely to be very different from those facing districts with many limited English proficient students. By focusing exclusively on larger districts, OCR does not reach effectively those school districts with few students with limited English proficiency. Although it is important for OCR to set priorities that reach the greatest number of students, OCR must not neglect entirely the districts with small populations of students with limited English proficiency because these school districts may be less familiar with the Title VI/*Lau* requirements.[30]

Recommendation: OCR should develop alternative strategies to ensure that its implementation, compliance, and enforcement efforts extend to all school districts, no matter how small their populations of students with limited English proficiency. OCR should conduct some compliance reviews in districts with small numbers of students with limited English proficiency to determine what particular issues are unique to such districts. Based on the experience it derives from these compliance reviews, OCR should develop technical assistance materials for school districts with small numbers of students with limited English proficiency to assist them in complying with Title VI and *Lau* and providing equal educational opportunity to students with limited English proficiency in their districts.

Written Communications with School Districts

Finding: OCR's letters of findings are the most important written contact between OCR and school districts, and the analyses enunciated in them should be thorough and clear. A review of OCR case letters reveals that OCR's letters of findings in *Lau* cases generally do not provide a thorough explication or analysis of OCR policy on important compliance issues affecting the school district. OCR's letters of findings rely heavily on the use of certain key legal terms of art, such as "effective participation" and "meaningful access," that reflect the analytical underpinnings of OCR's

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28 *See* chap. 4, p. 84.

29 *See* chap. 4, p. 84.

30 *See* chap. 4, pp. 85–88.

Title VI/*Lau* policy. However, the letters of findings generally do not explain sufficiently in practical educational terms—through examples, specific criteria, or further explication or elaboration—the meaning or, more important, the application of these legal terms. In letters of findings and other written communications to the school districts being investigated, OCR generally provides brief summaries of the civil rights laws and policies that guide its compliance and enforcement activities. These legal summaries do not explain the connection between "equal educational opportunity" and "affirmative steps," "effective participation," and "meaningful access." Establishing the meaning of equal educational opportunity in relation to "effective participation," "affirmative steps," and the opening of the school's instructional program, would assist school districts in meeting their obligations under Title VI and *Lau*.

The terms "excludes from effective participation" "affirmative steps" and "open its instructional program" beg some standard of comparison for the school district to use in measuring its ability to meet these requirements. However, OCR's letters of findings do not explain how a school district determines what constitutes "effective participation." In addition, the summaries fail to identify the level of effort required by school districts in taking "affirmative steps." They also fail to address the specific ways in which the school can ensure that it has "opened its instructional program to these students." Moreover, the brief mention of "OCR's enforcement experience" in letters of findings seems far too cursory a reference for such an important point.[31]

Recommendation: Letters of findings serve as one of the principal sources of written communication between OCR and the school district. It is, therefore, important that such written communications provide the clearest, most precise, most readily accessible language in explaining the civil rights laws, regulations, and policies on which OCR bases its compliance and enforcement activities. At a minimum, OCR should ensure that letters of findings and other written contacts with school districts provide the districts with the most complete and thorough analysis of its policy possible, so that school districts will know exactly what the policy is. OCR should explain in practical terms the meaning of the legal terminology it uses. OCR can enhance the overall effectiveness of its written communications with school districts by providing further elaboration on the meanings of and connections between certain key terms. For example, in its written communications with school districts, OCR should explain explicitly the relationships among terms, such as "equal educational opportunity," "effective participation," "affirmative steps," "open its instructional program to these students," and "legitimate trial."

Promising Practices and Models that Work

Finding: OCR's promising practices documents are designed for school districts as part of its technical assistance efforts as well as for OCR staff to use as guides in developing remedial plans for school districts that are not in compliance with civil rights statutes. Promising practices or models that work are useful ways for OCR to provide districts with information on educationally sound programs and what it takes to implement them.[32]

Recommendation: OCR should continue to develop and disseminate documents describing promising practices or models that work to ensure that school districts across the country have available to them information on educationally sound programs and how to implement them.

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31 *See* chap. 4, pp. 76–77.

32 *See* chap. 4, p. 92.

Chapter 5. Parental Notification and Involvement of Parents

Parental Notification and Inclusion: Civil Rights Implementation, Compliance, and Enforcement Activities

Finding: OCR has produced substantial technical assistance documentation for school districts containing information on parental involvement. For example, the recent "Promising Practices and Programs for Serving National Origin Limited English Proficient Students," prepared by the headquarters *Lau* team, contains information on a two-way bilingual immersion program in California that places a strong emphasis on parental involvement in program development and implementation. The document also discusses six other programs from school districts around the country that the OCR *Lau* team has identified as promising practices. The descriptions of these programs each address the way that the programs incorporate parental involvement in their development and implementation. For example, the outline of an El Paso, Texas, alternative language program for students with limited English proficiency in grades K–6, contains the following description of its parent outreach program:

> The School makes considerable effort to involve parents in the school life of their children. Parents are involved in the governance process and support classroom and school-wide activities. The staff person, who acts as liaison between school and the home and was hired with Chapter I funding, plays a key role in ensuring that parents of the school's students with limited English proficiency become active in the school community. The home liaison person is bilingual and lives in the neighborhood. Her roles include serving as attendance liaison, providing ESL instruction to parents three mornings a week, offering parent training, and staffing the parent-activity center.

This description provides a brief overview of the program's efforts to conduct parent outreach and promoting parental involvement.[33]

Recommendation: OCR should continue disseminating to school districts its Promising Practices and Programs technical assistance guidance information on parental notification and involvement in program development and implementation. In addition, OCR should focus on communicating two important components of an effective civil rights compliance program. First, it should fashion policies that elaborate thoroughly on civil rights compliance relating to parents. Second, OCR should recognize parental notification and involvement and institutional efforts to facilitate parental inclusion as a key principle in a school district's proactive civil rights compliance plan.

Finding: The Bilingual Education Act includes a provision that allows parents the "option to decline" their child's participation. The act states that if a parent chooses this option, "[a] local educational agency shall not be relieved of any of its obligations under title VI of the Civil Rights Act of 1964 because parents choose not to enroll their children in bilingual education programs." However, where parents choose to decline their child's participation in a program funded under the act, the act does not provide any guidelines on how the parents will work with school personnel to resolve any issues relating to the form of language assistance the school will provide in this circumstance. Neither the act nor the Department's General Administrative Regulations provides guidance on this issue.[34]

Recommendation: OCR, in conjunction with OBEMLA, should develop policy guidelines to assist schools in understanding and meeting their obligations under Title VI and *Lau v. Nichols* in instances where the schools have determined that a student needs special language instruction to participate meaningfully in the regular education programs, but the student's parents decline their child's participation.

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33 *See* chap. 5, pp. 105–07.

34 *See* chap. 5, pp. 98–99.

Chapter 6. Utilizing Neutral and Nondiscriminatory Diagnostic and Screening Procedures

Identification, Assessment, and Placement Procedures

Finding: Discriminatory screening and diagnostic procedures can result in the failure to identify and place students with limited English proficiency in education programs properly. This failure derives in part from the lack of Federal guidelines pertaining to identification, assessment, and placement of students with limited English proficiency. There are no federally recommended criteria for identification, assessment, or evaluation of students with limited English proficiency. Thus, State and local education agencies remain largely responsible for identification, assessment, and placement of these students.

OCR policy requires that school districts have in place procedures for identification, assessment, and placement of students with limited English proficiency, but it has not issued policy guidance on the content of these procedures. In the late 1970s, OCR attempted to issue uniform guidelines in the form of the "*Lau* Remedies," or the "*Lau* Guidelines." In 1978, the Department of Health, Education, and Welfare announced that it would publish the 1975 *Lau* Remedies as proposed regulations in the *Federal Register*. In 1980, DOEd published the "Notice of Proposed Rulemaking," which became known as the *Lau* Guidelines. Although these guidelines never were adopted formally as DOEd regulations, they continue to have tremendous influence over State and local education agencies. Many States continue to rely on some of the discredited or questionable educational practices advanced in the *Lau* Guidelines, such as heavy reliance on percentile cutoffs on standardized tests in determining the presence of limited English proficiency and the use of home language survey questions that could easily lead to misinterpretation of the primary language spoken in the student's home.

OCR addresses some topics related to identification, assessment, and placement through its compliance and enforcement activities, and it includes discussion of identification and assessment procedures in its September 1991 memorandum, December 1985 memorandum, *Lau* investigative plans, and staff training materials. However, without comprehensive policy guidance from OCR, school districts are left with little Federal guidance on the criteria that are necessary for a school district's identification, assessment, and placement procedures to be in compliance with the requirements of Title VI under *Lau*.[35]

Recommendation: OCR should develop and issue comprehensive policy guidance addressing the criteria that are necessary for a school district's identification, assessment, and placement procedures to be in compliance with the requirements of Title VI under *Lau*. The guidance should draw from court cases that have raised identification, assessment, and placement issues in the context of *Lau* and from OCR's own enforcement experience. Furthermore, in developing the policy guidance, OCR should work with State and local education agencies, education organizations, civil rights groups, and think tanks to integrate civil rights and education perspectives.

While providing latitude to school districts to choose their own identification, assessment, and placement procedures, the policy guidance should provide criteria for school districts to use to ensure that they identify, assess, and place students in a nondiscriminatory manner and ensure: 1) that all students with limited English proficiency within their boundaries are identified, 2) that their individual language needs are assessed properly, and (3) that they are placed in programs best suited to meet their individual needs and overcome the language barriers they face so that they can participate meaningfully in the regular education program. The policy guidance also should delineate common educational practices that result in noncompliance with Title VI. It should contain separate sections on each of the three phases of placing a student with limited English proficiency in an alternative education

35 *See* chap. 6, pp. 113–14, 124–25.

program: 1) identification, 2) assessment, and 3) placement, and address each of the specific areas raised in the recommendations below.

OCR should ensure that policy guidance: 1) clearly defines the target group; 2) accounts for relative levels of skill in both languages; 3) uses more than one method or instrument for evaluation; 4) produces educationally sound assessment procedures based on a clear definition of the target group to reduce the problem of inappropriate placements for students in need of a special instruction program and to ensure that schools can effectively determine which educational approach should be implemented in the instruction program; 5) allows all students to be given the opportunity to remain in the regular education program should they or their parents so choose; 6) determines language proficiency through an assessment of all four language skills: speaking, reading, writing, and understanding/listening; and 7) ensures the use of multiple assessment instruments to ensure *appropriate*, neutral, and nondiscriminatory placements.

Home Language Surveys

Finding: The procedures used by school districts to identify a pool students of students who potentially have limited English proficiency, in particular, the use of the home language survey, can be ineffective. The principal problem with the use of home language surveys has not been the concept behind the practice, but the way it has been implemented. For example, the *Lau* Guidelines, which inspired the screening procedures still used by many school districts, recommended that the home language survey ask if *someone*, not just the child, in the home speaks a language other than English. Extensive intergenerational differences in language use make this question problematic. It is common in immigrant families for the grandparents or parents to rely on the use of a language other than English. However, this knowledge does not provide any information about what language the child speaks. If a monolingual English-speaking child answers "yes" to the question of whether someone in his home speaks a language other than English, he or she may be identified erroneously as a student with limited English proficiency. The remaining procedures commonly used to determine the child's level of English language proficiency may not correct the mistake. Misrepresentation by parents or guardians who feel that their children will be placed in programs not conducive to learning English if they respond truthfully with regard to the native language spoken at home may be another problem with the use of home language survey.

Another problem related to the use of the home language survey is that some school districts implement the home language survey in a discriminatory manner. For example, OCR's Denver Enforcement Office (formerly Region VIII) has discovered that one New Mexico school district provides special language services only to students with Hispanic surnames who have recently arrived from Mexico. This practice denies the reality that many students with limited English proficiency may be members of families living in the United States for generations.

Despite problems resulting from poor implementation of home language surveys, experts agree that the home language survey, properly utilized, can be an invaluable tool as a screening procedure. For example, experts recommend that all State education agencies conduct home language surveys that inquire as to the student's place of birth and the first language acquired by the student. The core value underlying the use of home language surveys for identification purposes must be an emphasis on meeting the individual language needs of each student with respect to that student's ability to read, write, speak, and comprehend the English language.[36]

Recommendation: To prevent improper use of the home language survey, DOEd, through the joint efforts of OCR and OBEMLA and in collaboration with State and local education agencies, should issue new policy guidance addressing local school districts' use of the home language survey. Such policy guidance should clarify that home language surveys must be administered to all students, not just students with Spanish sur-

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36 *See* chap. 6, pp. 114–17.

names, or students suspected of having limited English proficiency. Furthermore, to promote the most appropriate use of the home language survey, OCR should ensure, through collaboration with OBEMLA, State and local education agencies, civil rights organizations, and educational experts, that such policy guidance is developed carefully and informed thoroughly by sound educational perspectives. For example, DOEd should consider incorporating the recommendations advanced by the Council of Chief State School Officers on appropriate procedures for screening students for limited English proficiency in its policy guidance or in technical assistance materials that it disseminates to school districts.

Use of Standardized Testing in Assessment of Students with Limited English Proficiency

Finding: The practice of using standardized testing as the sole means of assessing the language proficiency of students identified as potentially having limited English proficiency may lead to biased or discriminatory placement decisions. Standardized testing practices can constitute a major barrier to appropriate placement for students who may require special instructional programs. For example, the literature reveals a connection between standardized testing and misclassification or inappropriate placement of students with limited English proficiency. Standardized testing practices that are creating barriers to equal educational opportunity for such students are associated with improper development or implementation or both. Specific testing practices are a concern prominent in both educational research literature and remedies mandated by the Federal courts. For instance, the use of percentile cutoffs has been criticized because it may lead to the misclassification of students. Another major problem identified in recent educational research literature and court cases is the use of standardized testing without the use of some other means of evaluation. Finally, the failure of a standardized test to consider a student's relative proficiency in English and his or her home language may lead to misclassification of that student.

However, educational experts agree that standardized tests can be a useful means of identifying and placing students with limited English proficiency. They also agree that, in some cases, the standardized tests may operate to discriminate against such students in education program placement. They, therefore, suggest means of eliminating the discriminatory effects of standardized testing. Here, as elsewhere with assessment instruments used by schools, the key is *proper* implementation and development of the instrument. The standardized test can be an accurate measurement of a student's need for placement in a language remediation program only with quality controls in place to ensure that it is developed and implemented properly.

Many experts agree that in determining language proficiency school personnel must assess all four language skills: speaking, reading, writing, and understanding/listening. Moreover, the operational definition of language proficiency must address proficiencies in *both* the native, non-English language and the English language. This is extremely important, because students with limited English proficiency may or may not be proficient in their native language. Their ability to communicate in their native language can have a major impact on their ability to learn English and their ability to learn new content in either language.[37]

Recommendation: OCR, in consultation with OBEMLA, State and local education agencies, civil rights organizations, and educational experts, should develop and issue policy guidance and technical assistance materials for school districts specifically addressing the use of standardized testing in assessing students to determine whether they have limited English proficiency and should be placed in a language education program. The policy guidance and technical assistance materials should clarify that standardized tests should be used with great caution and never should be the sole criterion used to assess

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37 *See* chap. 6, pp. 117–21.

students' English proficiency. They should emphasize the need to test all four areas of language proficiency (speaking, reading, writing, and understanding/listening) to make a valid assessment of a student's English language proficiency. They should address the use of cutoff scores to make determinations as to whether students are eligible for alternative instructional programs. They should require schools to take students' relative proficiency in English and their native language into account in the placement decision. Finally, they should draw upon educational research to incorporate guidance on the development of valid procedures for determining whether students should be placed in alternative instructional programs.

Partnership Process

Finding: OCR's Kansas City Enforcement Office (formerly Region VII) offers guidance to school districts on *Lau* compliance on identification and assessment procedures through the use of self-evaluation instruments in its PAR review pilot program. Most of the questions contained in the section on identification in the "District Assessment Guide" are not framed with enough precision. In addition, although the use of the rating system-type questions may make the guide more time effective and generally "user-friendly" for school officials completing it, this is a superficial method for evaluating the extent of school officials' procedural knowledge.

Although the questionnaire contained in the "District Assessment Guide" could be improved upon with respect to the specificity of some of its questions, it, nonetheless, is an innovative technique for conducting factfinding activities on a school district's *Lau* identification and assessment procedures. In addition, it provides a valuable opportunity for the school district itself to examine its procedures for identification and assessment. As such, the PAR review process is a useful means of implementing OCR's *Lau* policies for assessing school district programs.[38]

Recommendation: OCR should increase its efforts to disseminate information about partnership practices among its regional staff by issuing formal "partnership practice" guidelines based on the "PAR review" pilot program developed by the Kansas City Enforcement Office. In particular, OCR should finalize the PAR review self-assessment surveys and disseminate them to all of the regional offices. OCR should initiate training on the application of partnership principles to the mediation and negotiation of compliance resolutions. OCR also should explain the partnership approach to the public, advocacy groups, State and local education agencies, school districts, teachers, parents, and students, and solicit their participation. OCR should emphasize the importance of working with its customers and stakeholders on their mutual interest in access to a quality education for all students.

OCR staff, both headquarters and regional, should continue to develop creative and innovative mechanisms, such as the "District Assessment Guide," in providing guidance to school districts on *Lau* compliance with respect to identification and assessment procedures. OCR should improve on the self-evaluative instrument used in this effort by ensuring that its section on identification clearly defines what it is referring to when it asks such questions as "Are the district's procedures effective in identifying all students who have a primary or home language other than English?" OCR should provide the school districts with specific criteria for what would constitute "effective" procedures. In addition, OCR should develop more thorough, precise means than rating systems to determine the level of knowledge possessed by school officials on the procedures themselves.

Chapter 7. Structuring Educational Programs to Serve a Diverse Student Population

Background

Finding: Congress has advanced the mandates of *Brown* and *Lau* in civil rights statutes and the Bilingual Education Act. Congress included the

38 *See* chap. 6, pp. 126–27.

Supreme Court's ban on segregation in the Civil Rights Act of 1964 and codified the Court's *Lau* decision in the Equal Educational Opportunities Act of 1974. As a result, shifts in Federal education policy largely have reflected concerns about the segregative effects of certain educational programs.

In maintaining a primary objective to place students in regular classes or core academic curricula to the greatest extent possible, schools are complying with *Brown* and *Lau*. Using these cases as a framework, policymakers and educators during the last 20 years have made placement in regular classes an important goal in developing programs for students with limited English proficiency. The Federal courts also have sought to eliminate the segregative effects of school district practices by formulating remedies that place all students in regular classes to the greatest extent possible.[39]

Recommendation: OCR and OBEMLA, working in collaboration with State and local educational agencies, should continue to develop and implement innovative educational programs and practices that: 1) rely on sound educational approaches and place students with limited English proficiency in classrooms along with their English-proficient peers so that they can participate in mainstream academic and extracurricular programs; 2) are reasonably calculated to correct achievement disparities among identifiably different students, adopt varied teaching styles and strategies to recognize different student learning styles, and heighten teacher expectations of all students; and 3) incorporate program evaluations (reassessment and appropriate placement of students) of all alternative language programs consistent with the school district grading periods.

Legislative Barriers

Finding: School practices relating to the development and implementation of education programs for students with limited English proficiency have been influenced heavily by the development of Federal education policy since the passage of the original Bilingual Education Act in 1968. However, one aspect of Federal legislation over the past three decades has had adverse effects on schools' development and implementation of education programs with a primary goal of placing students in the regular education program to the greatest extent possible. This has been the emphasis on provisions that restrict the options schools may pursue in developing and implementing education programs. The Bilingual Education Act has placed restrictions on the types of programs that could be funded under the act, and these restrictions have in turn limited school districts' options. For instance, between 1974 and 1978, the Bilingual Education Act placed an emphasis on funding bilingual education programs, with the result that school districts were steered away from adopting education programs for students with limited English proficiency that did not use the students' native language in instruction. In some cases, the emphasis on bilingual education resulted in limited English proficient students being unnecessarily segregated from their English-proficient peers, even after they were able to participate meaningfully in the regular classroom. The Bilingual Education Act has been amended to make it clear the primary purpose of programs funded under the act is to allow students to achieve English proficiency.[40]

Recommendation: Congress should continue to provide, through the Bilingual Education Act, funding for special language instruction programs for students with limited English proficiency without being unnecessarily prescriptive. Schools receiving funding under the act should be given wide latitude to develop and implement innovative programs of their own choosing, provided such programs achieve a successful balance between the goals of integration and effective participation (by maintaining as a primary objective the placement of students with limited English proficiency in regular education programs to the

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39 *See* chap. 7, pp. 131–37.

40 *See* chap. 7, pp. 138–44.

greatest extent possible) and English proficiency for limited English proficient children.

Maintaining a Primary Objective of Regular Education Placement: Civil Rights Implementation, Compliance, and Enforcement Activities

Finding: Since OCR has not issued formal policy guidance on *Lau* compliance since the September 1991 memorandum, its policy guidance on the segregative effects of school district issues does not incorporate guidance provided by the Federal courts on this issue after 1991. In addition, OCR's policy guidance lacks support from recent court cases for its position related to segregative effects. Several recent decisions by Federal courts, including the decisions in *Diaz v. San Jose Unified School District* and *People Who Care v. Rockford Board of Education*, have specifically addressed the segregation of students with limited English proficiency. These cases have provided useful language that OCR might incorporate in future policy guidance on the importance of school district efforts to ensure that special language programs do not result in segregation for their limited English proficient student participants.[41]

Civil rights compliance, particularly in the *Lau* context, requires school districts to structure education programs that have the least segregative effects, in terms of both physical integration and meaningful access, for students with limited English proficiency. Part of accomplishing the goal of compliance lies in school districts' effectiveness in meeting the legal obligations to provide equal treatment (*Brown*), and effective participation and meaningful access (*Lau*). These requirements for nondiscrimination help to ensure that State and local educational agencies remain committed to providing students who have limited English proficiency with education programs that offer the same educational benefits as the regular education program offers English-proficient students.[42]

Recommendation: OCR should reinforce its Title VI implementation by issuing new policy guidance and conducting technical assistance and outreach and education for school districts. Specifically, in developing these revisions, OCR should focus on communicating several important components of an effective civil rights compliance program. First, it should fashion policies that elaborate thoroughly on civil rights compliance relating to segregative effects that can result through alternative education programs. Second, OCR should recognize structuring education programs designed to serve a diverse student population by maintaining a primary objective to place students in regular classes to the greatest extent possible explicitly as a key element in a cohesive and strong civil rights compliance program. Such a program would ensure compliance through an emphasis on helping schools to implement properly educational programs that include each of the following elements: 1) soundness of educational approach with remedies that place students who are limited English proficient in classrooms with their English-proficient peers, allowing participation in mainstream academic and extracurricular programs; 2) reasonably calculated to implement effectively the educational theory by correcting achievement disparities among identifiably different students, adopting varied teaching styles and strategies, to recognize different student learning styles, and to heighten teacher expectations of all students; and 3) program evaluations (reassessment and appropriate placement of students) of all alternative language programs consistent with the school district grading periods.

Grouping Students to Reflect Differential Abilities: Civil Rights Implementation, Compliance, and Enforcement Activities

Finding: Grouping students to reflect differential ability in various subjects is key to providing equal educational opportunity. OCR has recog-

41 *See* chap. 7, pp. 135–36.

42 *See* chap. 7, pp. 144–48.

nized the importance of this educational practice in a technical assistance document containing a summary of its current policy. In this document, OCR states that "[u]nder Title VI, recipients must also ensure that LEP students have equal and appropriate access to programs such as gifted and talented programs, high level courses, special education programs and extra-curricular activities." To emphasize effectively the importance of grouping students to reflect differential ability in various subjects, schools must develop and implement programs that assess students accurately and offer access to all subject areas, including both remedial, regular, and advanced curricula.

However, many schools' education programs simply ignore this aspect of program development and student placement. For the most part, schools have failed to distinguish students' abilities in a variety of academic subjects. As a result, students with limited English proficiency are, for example, severely underrepresented in programs for the gifted and talented. Education programs routinely offer methods for identifying such differentials for English-proficient students, so they must also do it for students with limited English proficiency. There is little law or policy that directly addresses the need for grouping students to reflect differential ability in various subjects.

According to a recent report of the National Academy of Sciences on educational issues relating to students with limited English proficiency, "learning, knowledge, and understanding differ across subject matter." In the context of educating students with limited English proficiency, grouping students to reflect differential ability in various subjects has not played an important role in schools' determinations about student ability in different curricular areas. The problems associated with education programs that fail to group students with limited English proficiency to reflect differential ability include failure to detect differential abilities across content areas and to detect gifted and talented abilities and the need for special or remedial education programs for such students. Grouping practices that reflect students' differential abilities may eliminate problems for students with limited English proficiency, such as a school's failure to provide appropriate instruction across content areas, the underinclusion of students with limited English proficiency in advanced programs and gifted and talented programs, and a school's failure to develop appropriate curricula for such students in advanced programs and gifted and talented programs.[43]

Recommendation: OCR should clearly enunciate in its Title VI/*Lau* policies the importance of grouping students to reflect differential ability in various subjects in the *Lau* context. OCR should recognize in its Title VI policies the parallels between the policy that DOEd has developed under section 504 and the IDEA for students with disabilities and the Federal framework under Title VI and the Equal Educational Opportunities Act for ensuring nondiscrimination against students with limited English proficiency.

Finding: The misclassification of students with limited English proficiency into special education programs is a serious compliance problem. OCR has found severe problems with misclassification into special education programs. The September 1991 memorandum provides sound basic guidance on this issue in stating that "school systems may not assign students to special education programs on the basis of criteria that essentially measure and evaluate English language skills." However, the memorandum does not provide any detailed guidance on this issue.

In general, the memorandum lacks any specific policy guidance on assessment procedures for determining appropriate placement in special education or both special education and an alternative language program for students with limited English proficiency.

The memorandum does not specify which *kinds* of instruments would be sufficient in making an assessment of the level of a given student's aptitude or abilities for determining the appropriateness of a special education placement for that student. For example, the lack of detail here begs the question of whether an appropriate instru-

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43 *See* chap. 7, pp. 148–54.

ment would have to be administered in the student's native language. In addition, although the memorandum does refer to the problem of "no double services," where a school district does not provide both alternative language services and special education even though there may be students who require both, the memorandum does not specifically address assessment procedures for determining whether a student with limited English proficiency would be appropriately placed in an alternative language program or a special education program or both.

Section 504 regulations do not address this issue either. OCR has issued a regulation stating that recipient school districts must ensure that "[t]ests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure." This regulation refers to a speech impairment. This terminology is inadequate as a means of establishing coverage for students with limited English proficiency because such proficiency may not be deemed an "impairment." The appendix for this section notes that this subparagraph formerly contained a regulation requiring recipients to "provide and administer evaluation materials in the native language of the student," but that this requirement had been removed from the regulations "as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute." However, none of OCR's current policy guidance on *Lau* compliance makes any reference to this requirement.[44]

Recommendation: OCR should issue new policy guidance on assessment procedures for determining appropriate placement in special education or both special education and an alternative language program for students with limited English proficiency. This policy guidance should specify which *kinds* of instruments would be sufficient in making an assessment of the level of a given student's aptitude or abilities for the purpose of determining the appropriateness of a special education placement. The new policy guidance should address the question of whether an appropriate instrument would have to be administered in the student's native language. Finally, the new policy guidance should address assessment procedures for determining whether a student with limited English proficiency would be appropriately placed in an alternative language program or a special education program or both.

Reevaluations, Monitoring, and Exiting Students: Civil Rights Implementation, Compliance, and Enforcement Activities

Finding: OCR's guidance on exit criteria appears as part of the September 1991 memorandum's discussion on proper program implementation, the second prong of the *Castaneda* test. The issue of exit criteria also may be associated with a program's results, since the academic achievement of exited students is the main measure under the third prong. Exit criteria are, therefore, an important aspect of OCR's inquiry. However, OCR does not offer any specific guidance to staff on criteria other than testing in making a determination of students' readiness for exiting an alternative language education program. For example, the policy does not refer to teacher assessments in this context. This lack of reference to multiple measures for such a crucial aspect of program implementation as exit criteria makes the policy discussion appear incomplete.[45]

Recommendation: OCR should revise its *Lau* policy guidance to offer specific guidance to staff on exit criteria other than testing in making a determination of students' readiness for exiting an alternative language education program. The new policy guidance should refer to teacher assessments in this context. This reference to multiple measures for such a crucial aspect of pro-

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44 *See* chap. 7, pp. 154–57.

45 *See* chap. 7, pp. 157–58.

gram implementation as exit criteria would make OCR's policy guidance more complete.

Finding: OCR's letters of findings do not provide a thorough and complete analysis of OCR's policy on the exit criteria issues. For example, one *Lau* letter of finding developed by OCR staff failed to cite OCR's September 1991 memorandum on exit criteria related to the standards that should be met, such as the necessity for exit criteria that test all four English language proficiency skill areas. Nor does the letter of finding contain any information on whether, as the September 1991 memorandum indicates, the school district was able to "explain why it has decided that students meeting those standards [the school district's exit criteria] will be able to participate meaningfully in the regular classroom." Moreover, the analysis presented in this letter of finding does not contain any reference to OCR's policy of recommending the use of multiple criteria in assessing students' readiness for exiting an alternative language education program. It is, therefore, unclear whether OCR provided any information to the school district.[46]

Recommendation: OCR should ensure that its letters of findings to school districts provide analysis containing reference to its policy of recommending the use of multiple criteria assessing students' readiness for exiting an alternative language education program. OCR should make clear in its letters of findings its recommendation that evaluation instruments should measure four areas of English language proficiency—reading, writing, speaking, and understanding—as stated in the September 1991 memorandum on the adequacy of program implementation.

Finding: OCR's policy guidance needs further elaboration to emphasize the importance of regrouping and reevaluating all students periodically. Currently, no specific references to this or related issues exit in the Title VI/*Lau* policy guidance.[47]

Recommendation: OCR should issue a policy memorandum and conduct technical assistance and outreach and education that emphasize the importance of regrouping and reevaluating all students periodically. OCR should provide a thorough, detailed, comprehensive, and complete analysis of the civil rights perspectives relating to this educational practice. Specifically, in developing this policy memorandum OCR should focus on communicating several important components of an effective civil rights compliance program. First, it should enunciate clearly for school districts the importance in the *Lau* context of reevaluating and regrouping students periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development. Finally, OCR should recognize reevaluating and regrouping students periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development as a key element in a cohesive and strongly proactive civil rights plan that ensures compliance through an emphasis on helping schools to implement each key element properly.

Chapter 8. Evaluating and Allocating Teachers, Facilities, and Other Resources Across Educational Programs

Addressing Limited Staffing and Funding and Inefficient Distribution Allocation of Teachers

Finding: Research on the shortage of bilingual teachers reveals an enormous need. The number of teachers needed has grown from 120,000 in 1976 to a projection of 200,000 for the year 2000. This projection includes teachers of all languages, with Spanish being the highest percentage (72 percent). When broken down by State, the severity of the problem becomes even clearer. California has projected that its public schools will require 17,000 more teachers by the year 2000.

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46 *See* chap. 7, pp. 158–61.

47 *See* chap. 7, pp. 158–61.

With inadequate numbers of teachers in many school districts, schools cannot provide enough staff to meet the needs of integrated classrooms. Ever-increasing numbers of students from language minority backgrounds continue to exacerbate this problem. Some school districts have reacted to the shortage of teachers trained to teach students with limited English proficiency by grouping them in overly large classes where they receive alternative language instruction but are effectively segregated from their English-proficient peers. Other school districts, however, have integrated students with limited English proficiency into the regular classroom, without providing them with alternative language instruction, effectively denying them a comprehensible education.[48]

Recommendation: Congress and DOEd should help State and local educational agencies address this problem by developing incentive programs targeted to recruitment and professional development of individuals such as college and high school students, and members of youth groups and organizations, particularly those who are or have been students with limited English proficiency, and institutions such as civil rights advocacy groups and universities who may have a stake in the field of alternative language programs for students with limited English proficiency. For example, in the case of State educational agencies (including institutions of higher education, particularly State and private colleges and universities), Congress and DOEd could introduce funding incentives that would stimulate the recruitment and development of bilingual, ESL, and other alternative education program professionals. For local school districts, DOEd could assist in the creation of recruitment and retention programs to encourage experienced bilingual and ESL teachers to remain in the field. For localities having the most urgent need, Congress and DOEd should seek to assist local educational agencies by providing strong recruitment incentives, including supplemental incentives such as further education or other financial compensation to potential bilingual or ESL teacher candidates. In the case of civil rights advocacy groups, for example, DOEd could work in collaboration to develop recruitment strategies, including media presentations and public affairs campaign efforts.

In addition, OCR should investigate in detail the impact of student-teacher ratios on the educational development and progress of students with limited English proficiency and teaching personnel allocations by examining various correlates, e.g., language background, teacher credentials, school district expenditures, and regular education programs vs. bilingual, ESL, or other alternative language programs. Additional studies should be made by OCR and/or OBEMLA and the Office of Educational Research and Improvement on the relationships between teacher shortages and certification practices and procedures. The results of such studies could yield valuable information for creating policies relating to teacher allocations and resources in developing and implementing alternative language programs for students with limited English proficiency.

Teacher Training, Certification, and Allocation: Civil Rights Implementation, Compliance, and Enforcement Activities

Finding: Although OCR recognizes the importance of well-trained teachers in developing and implementing educational programs, its policy guidance does not offer enough specificity in defining important terminology related to teaching compliance. The September 1991 memorandum gives its most thorough policy guidance in the area of staffing requirements. It places a heavy emphasis on teacher training and certification. OCR's recognition of the importance of teacher qualifications as crucial to effective program implementation and, in turn, civil rights compliance appears most evident in the September 1991 memorandum's discussion of staffing requirements for bilingual education programs.

For example, the memorandum states the requirement that bilingual education programs

48 *See* chap. 8, pp. 167–68.

must be staffed with bilingual teachers to be in compliance with *Lau*. In particular, the memorandum notes that for a school district to implement a bilingual education program properly, "at a minimum, teachers of bilingual classes should be able to speak, read, and write both languages, and should have received adequate instruction in the methods of bilingual education."[49] In addition, the memorandum states that OCR requires recipient schools to be able to show that they have determined that their bilingual teachers have these skills.

The memorandum does not, however, offer any further detail as to the *level* of the teacher's language abilities.[50] It does not state, for example, whether a teacher must be a fluent speaker of the native language of his or her students or if some lesser proficiency level will suffice. Neither does the memorandum offer any definition or examples that might help to define the meaning of the term "adequate instruction in the methods of bilingual education." Without this specificity, the quality of instruction received by students with limited English proficiency may vary widely.

Elsewhere, the memorandum offers more detailed guidance to OCR staff in conducting *Lau* compliance activities. For example, with respect to other educational programs, such as ESL or structured immersion programs, the memorandum states that "the recipient should have ascertained that teachers who use those methods have been adequately trained in them."[51] Here, however, the memorandum offers examples of adequate training. It states that "[t]his training can take the form of in-service training, formal college coursework, or a combination of the two." These examples serve to define the meaning of the term "adequate," thereby offering OCR staff clearer guidance in conducting compliance activity than that given for teacher qualifications in the bilingual education program context.[52]

Recommendation: OCR, in collaboration with OBEMLA and OERI, should issue clear civil rights policy guidance relating to teacher training and certification for all educational programs and practices, including bilingual education, ESL, and structured immersion programs. OCR should continue to ensure that its civil rights policy guidance on teacher training and certification is adequately disseminated to State and local educational agencies. OCR should continue to offer technical assistance and outreach and education to ensure that all OCR staff, school officials, and parents have a good understanding of legal civil rights issues affecting compliance presented in its policy guidance related to teacher training and certification.

Finding: In conducting its *Lau* compliance reviews, OCR frequently encounters problems associated with staffing requirements. In addressing the numerous qualified teacher shortages among the school districts it evaluates, OCR has encountered school districts whose problem in this regard sometimes lies in a failure to determine whether they have staff with the required qualifications. For example, some schools have staff with qualifications to teach ESL or bilingual education programs, but the school administration remains unaware of these teachers' qualifications. For this reason, OCR requests that schools survey their staffs not just for qualifications alone but for teacher interests. In this way, the school might discover qualifications that would otherwise have gone unnoticed and can attempt to redirect a teacher resource for use in an ESL or bilingual program.[53]

Recommendation: The OCR and OBEMLA, in collaboration with colleges, universities, State education agencies, and local school districts should

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49 *See* chap. 8, p. 169.

50 *See* chap. 8, p. 169.

51 *See* chap. 8, p. 170.

52 *See* chap. 8, pp. 170–72.

53 *See* chap. 8, pp. 172–73.

establish programs that recruit and train bilingual/English as a Second Language teachers specifically for underserved languages, such as the Southeast Asian languages. In addition, OCR should conduct more outreach and education and technical assistance activities to encourage State and local educational agencies to develop "grow your own" teachers programs that provide bilingual/ESL training to current staff.

Finding: Civil rights compliance, particularly in the *Lau* context, requires an emphasis on evaluating and allocating teachers, including teacher training and certification. Such an emphasis helps OCR to evaluate thoroughly school districts' education programs for students with limited English proficiency. It, therefore, reflects the obligations created under *Lau* to provide effective participation and meaningful access to schools' regular education program. In addition, this emphasis on teacher qualifications and allocation supports nondiscrimination because it helps to ensure that State and local educational agencies remain committed to providing students who are limited English proficient with education programs that offer the same educational benefits as the regular education program offers.

In general, OCR's practices relating to evaluation and assessment of the role of teachers, including training, qualification, certification, and allocation of teachers, in education programs for students with limited English proficiency appear strong. However, weaknesses currently remain in OCR's record here due primarily to the lack of formal policy guidance. Although in conducting civil rights compliance OCR appropriately places an emphasis on the role teachers play in the development and implementation of education programs, OCR's Title VI/*Lau* policies do not address this issue.

There are no specific references to the issues related to evaluation and allocation of teachers in education programs for limited English proficiency in OCR's Title VI/*Lau* policies. Similarly, OCR currently does not provide a thorough, detailed discussion addressing new case law and other important developments in these issues in its policy guidance.[54]

Recommendation: OCR should reinforce its Title VI implementation by revising its policy guidance. Specifically, OCR should issue a policy memorandum that provides a thorough, detailed, comprehensive, and complete analysis of the role of teachers, including training, qualification, certification, and allocation of teachers, as important components of an effective civil rights compliance program.

Evaluating and Allocating Facilities: Civil Rights Implementation, Compliance, and Enforcement Activities

Finding: Civil rights compliance, particularly in the *Lau* context, requires an emphasis on evaluating and allocating facilities and other resources across education programs. Such an emphasis helps OCR to evaluate more thoroughly school districts' education programs for students with limited English proficiency. It, therefore, reflects the obligations created under *Lau* to provide effective participation and meaningful access to the school's regular education program. In addition, this emphasis on the evaluation and allocation of facilities and other resources supports nondiscrimination because it helps to ensure that State and local educational agencies remain committed to providing students who are limited English proficient with education programs that offer the same educational benefits as the regular education program. OCR's letters of findings during the past 5 years occasionally address the issue of equitable allocations of facilities and instructional materials. It appears from a review of OCR's letters of findings that OCR staff provide a thorough evaluation of school districts' allocation of instructional materials to students with limited English proficiency. OCR staff make determinations in keeping with the prescription of the Title VI regulation as to whether school districts are ensuring that students with limited English pro-

54 *See* chap. 8, pp. 168–73.

ficiency have access to the same instructional materials used by English-proficient students.

In general, OCR's policies and practices relating to its allocation of resources and other facilities (such as classrooms, instructional programs, methodologies, and materials, including textbooks and computers) in education programs for students with limited English proficiency appear strong. By and large, OCR's written communications to school districts, such as letters of findings and resolution agreements, address these issues. However, weaknesses currently remain in OCR's record here due primarily to the lack of policy guidance.

In addition, review of OCR's letters of findings indicates that OCR staff engage in a careful inspection in measuring school districts' efforts to provide equal access to students with limited English proficiency through the evaluation and allocation of facilities and instructional materials. For example, these letters of findings contain assessments of the condition of the instructional materials used, their supply, and their age-appropriateness.[55]

Recommendation: OCR staff should continue to address the issue of equitable allocations of facilities and instructional materials. OCR's letters of findings should continue to provide a thorough evaluation of school districts' allocation of instructional materials to students with limited English proficiency. OCR staff should continue to engage in a careful inspection in measuring school districts' efforts to provide equal access to students with limited English proficiency through the evaluation and allocation of facilities and instructional materials.

Chapter 9. Undertaking Individualized and Institutional Efforts to Eliminate Barriers, Provide Equal Access, and Maximize Student Potential

Federal Funding to Assist States and Local School Districts in Developing and Implementing Educational Programs for Students with Limited English Proficiency

Finding: Reporting mechanisms on assessment of students with limited English proficiency are severely lacking in most States. Few States track such important data as retention rates, dropout rates, and special education referrals. As a result, it is difficult for States and local education agencies to make judgments on how best to strengthen programs and about the effectiveness of instruction at the local level.[56]

Recommendation: DOEd, through the concerted efforts of OCR, OBEMLA, and the Office of Educational Research and Improvement, and collaboration with State and local educational agencies, should collect systemic data on how the educational, particularly language, needs of students with limited English proficiency are being met and on their educational achievement. DOEd should focus its statistical research on the kinds of programs being implemented (e.g., developmental bilingual education, transitional bilingual education, English as a Second Language, immersion). In addition, DOEd should focus on gathering and compiling statistics about specific educational objectives of these programs and how well they are being met, and where appropriate, on the exiting of students from language assistance programs into the regular education classroom.

Finding: In general, funding for Federal programs targeted to students with limited English

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55 *See* chap. 8, pp. 179–84.

56 *See* chap. 9, pp. 189–90.

proficiency has not kept pace with the increasing numbers of these students.[57]

Recommendation: DOEd should work in collaboration with State and local educational agencies to conduct the necessary budget and financial exercises to determine the availability of State and local funding for educational services for students with limited English proficiency. DOEd should assist State and local educational agencies by providing appropriate financial consulting services and other necessary personnel and resources to develop State and local financial plans that can ensure equal educational opportunity for each student with limited English proficiency. DOEd also should assist in providing any other necessary budget-related services such as collecting statistical data, conducting fiscal surveys, and performing other statistical analyses on the availability of program funds for students with limited English proficiency. Where such analyses and studies reveal that a State or local educational agency is operating under an erroneous perception that funds are unavailable, it is crucial that DOEd work to ensure, through technical assistance efforts, that the State or local educational agency efficiently distributes its financial resources across programs and services for students with limited English proficiency and English-proficient students. Where DOEd finds that a State or local educational agency cannot support the financial burden of providing educational services to students with limited English proficiency, DOEd should assist States and local educational agencies in seeking creative solutions such as board of education supported proposals to introduce new tax incentive legislation at the State or even local level. Regardless of the findings of such studies, however, OCR should continue to maintain its strict stance on compliance with Title VI.

Finding: In fiscal year 1997, Congress appropriated a total of $261.7 million to the Office for Bilingual Education and Minority Language Affairs, which administers the Bilingual Education Act. Congress appropriated $156.7 million for instructional services under the Bilingual Education Act, $5 million for foreign language assistance programs, and $100 million for the immigrant education services. However, Congress provided no funding for support services or professional development programs under the Bilingual Education Act. Support services include grants to State educational agencies to provide technical assistance to local educational agencies, the National Clearinghouse for Bilingual Education, and Academic Excellence Programs, among others. Professional development programs fund grants for universities and colleges to institute programs to train teachers of students with limited English proficiency and to provide scholarships and fellowships to college students or school teachers seeking to educate students with limited English proficiency. All of these play critical roles in improving the quality of education programs for students with limited English proficiency nationwide.[58]

Recommendation: Given the importance of support services and professional development services in educating students with limited English proficiency, Congress should restore funding to these programs.

Technical Assistance Activity on *Lau* Program Evaluation Issues

Finding: Under OCR's organization prior to May 1996, OCR staff performed a variety of technical assistance functions on an informal basis. In addition, OCR formed a "*Lau* working group" composed of headquarters and regional staff whose members acted as subject matter experts creating informational materials for various regional compliance specialists and State and local school district personnel. This working group provided outreach and education and technical assistance to school districts to improve their understanding of their legal responsibilities to students with limited English proficiency.

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57 *See* chap. 9, p. 192.

58 *See* chap. 9, pp. 191–92.

Prior to the May 1996 reorganization, OCR staff in the *Lau* working group did not undertake these technical assistance activities as part of their formal duties, but rather on an informal, "whenever time allows" basis. Under OCR's May 1996 reorganization, all of the functions performed informally by the *Lau* working group are tasked informally to the "program legal teams" within headquarters, despite the importance of technical assistance activities. OCR also has failed to issue its "promising practices" document as a formal technical assistance manual that could be disseminated to school districts within and across enforcement regions. OCR also has not issued reports based on meetings of its *Lau* working group.

Technical assistance and outreach activities allow OCR headquarters to work with its regional staff, State educational agencies, and local school districts to share and exchange information, including promising educational practices and programs that can help schools in developing and implementing programs to meet their legal obligations under Title VI and *Lau*. In addition, these activities provide OCR with a venue for uncovering and resolving violations and developing a nonadversarial relationship with its customers.[59]

Recommendation: OCR should place a higher priority on its technical assistance activities and educational outreach by ensuring that adequate staff is allocated to fulfill these responsibilities. OCR also should ensure that its staff assigned to technical assistance activities are performing these functions as part of their official duties and not on an informal, "whenever time allows" basis. OCR should issue its "promising practices" documents as formal technical assistance manuals. OCR should disseminate its "promising practices" documents to a wide audience, including school districts, educators, scholars, advocacy groups, parents, and students, and solicit their input frequently to ensure that these documents remain current. OCR also should issue reports based on the meetings of the *Lau* working group. OCR should ensure that written materials developed by this group are disseminated regularly to State and local educational agencies.

OCR should continue to help school districts make effective use of its technical assistance and outreach and education documents by: 1) ensuring that school districts disseminate "promising practices" documents and that OCR continues to supply more outreach documents and 2) that school districts reviewing "promising practices" documents recognize that the following principles are some of the most crucial for them to focus on in developing their own programs: parental notification and encouragement of parental involvement, utilization of neutral and nondiscriminatory screening and diagnostic procedures, a primary objective of regular education placement, ability grouping to meet individual student needs, appropriate and timely reevaluations, a strong emphasis on teacher training and development, comparability and appropriateness in evaluation and allocation of facilities and resources, and thorough program evaluation and reporting and data mechanisms to ensure program effectiveness in ensuring equal educational opportunity for students with limited English proficiency.

OCR's Findings in Evaluating Overall Efforts of States and Local School Districts on Behalf of Students with Limited English Proficiency

Finding: OCR staff have found that State statutes and policies already in place affect the enforcement and compliance activities it undertakes. For example, in OCR's Region VIII, Arizona provides an example of a State with well-developed and implemented statutes and policies, whereas Colorado and New Mexico, also in Region VIII, have not reached as high a level with respect to their statutory law or policy relating to civil rights compliance under *Lau*. OCR in Region VIII has found that for States with well-developed statutes and policies, compliance with Federal law is usually synonymous with State compliance. However, in States that have very little statutory law or policy addressing *Lau* issues,

59 *See* chap. 9, pp. 197–200.

school districts may have little or no State guidance on civil rights compliance.[60] For example, Colorado only has a funding statute without any complementary civil rights statute or policy. This statute, known as the English Language Proficiency Act requires only a test of oral language proficiency to determine that a student has limited English proficiency. As a result, Colorado school districts have interpreted this statute to mean that a test of oral language proficiency alone is sufficient for identifying limited English proficiency. If students are found to be proficient, or nearly proficient, based on these test results, then some Colorado school districts end their inquiry there, and these students are not provided with alternative language services when they may need. This practice is contrary to OCR policy which requires that the identification process undertaken by school districts must include the four language skill areas: speaking, reading, writing, and understanding.[61]

Recommendation: OCR regional offices need to be informed of State civil rights policies and compliance programs for all States within their regions. In States where these requirements or civil rights compliance programs fall short of Federal requirements under Title VI and *Lau*, OCR should take appropriate steps to inform school districts and State officials of their obligations under Federal law and to ensure that school districts are in compliance with Title VI and *Lau*. OCR should recommend that all States review their civil rights policies and civil rights compliance programs to ensure that they adequately ensure compliance with Title VI and *Lau*.

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60 *See* chap. 9, p. 199.

61 *See* chap. 9, pp. 199–203.

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